Boston College Environmental Affairs Law Review

Volume 12 | Issue 1 Article 4

9-1-1985

Water as an Article of Commerce: State Embargoes Spring a Leak under *Sporhase v. Nebraska*

Edward B. Schwartz

WATER AS AN ARTICLE OF COMMERCE: STATE EMBARGOES SPRING A LEAK UNDER *SPORHASE v. NEBRASKA*

*Edward B. Schwartz**

I. INTRODUCTION

In the last two decades, water has become the focus of increased national attention, and may well be at the center of the most divisive political and legal battles in the years ahead.[1] While different interests such as agriculture, industry, energy development, and municipalities compete for the use of already limited water resources, supplies continue to decline.[2] Although water supply problems exist nationwide, in the arid West, water is being used faster than nature can replenish it, and supplies are rapidly diminishing. For example, the Ogallala Aquifer,[3] which supplies drinking water for two million people, is being reduced by three feet per year, and could be dry in thirty years.[4] In the East, more and more communities face water shortages because of pollution, antiquated and decaying pipelines, and inadequate storage capac-

---

* Editor-in-Chief 1983-1984, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] *See generally* Golden, *The OPEC of the Midwest*, TIME, Aug. 2, 1982, at 80; Sheets, *Water, Will We Have Enough To Go Around?*, U.S. NEWS & WORLD REPORT, June 29, 1981, at 34 [hereinafter cited as Sheets, *Enough*]; Sheets, *War Over Water Crisis of the 80's*, U.S. NEWS & WORLD REPORT, Oct. 31, 1983, at 57 [hereinafter cited as Sheets, *Crisis*].

[2] *See generally* Sheets, *Enough*, *supra* note 1; Sheets, *Crisis*, *supra* note 1; UNITED STATES WATER RESOURCES COUNCIL, THE NATIONAL WATER RESOURCES 1975-2000, SECOND NATIONAL WATER ASSESSMENT 2-81 (1978).

[3] An aquifer is "[a] geological formation or layer of material that is porous or permeable to water, thus capable of containing or carrying ground water." 7 WATERS AND WATER RIGHTS 273 (R. Clark ed. 1976); *see generally* WATERS AND WATER RIGHTS § 52.2 (R. Clark ed. 1967).

[4] Sheets, *Crisis*, *supra* note 1, at 60.

ity.[5] As the gap between supply and demand widens, disputes over water are likely to intensify. "The issue of water rights" has thus been described by one expert as "a bomb sitting there ready to explode."[6] How the dust settles could determine not only the shape of America's agriculture and industry, but also which towns and cities will survive and prosper in the coming decades.[7]

In resolving these disputes, questions of the proper role of states, and that of the federal government, in allocating limited water supplies must be addressed. While water rights have traditionally been regulated almost exclusively by the states, the Congress possesses significant authority to regulate water use. The potential for heated federal-state conflicts exists, therefore, as thirsty communities and industries battle for dwindling water resources.

Currently, the federal government regulates water in a number of ways.[8] For example, federal statutes insure free navigation in the nation's waters,[9] control water pollution,[10] protect wildlife,[11] and protect coastal areas.[12] There is little federal law, however, regulating the rights of private water users.[13] Rather, Congress has consistently chosen to give the states free reign to regulate water distribution and to take steps to preserve water for its citizens.[14] One way states do so is by enacting water "embargo" statutes which limit or prohibit water exports to a neighboring state.

In July, 1982, the United States Supreme Court struck down, in part, a Nebraska statute which greatly limited the right of its

---

[5] Sheets, *Enough*, *supra* note 1, at 36-37.

[6] Sheets, *Crisis*, *supra* note 1, at 57.

[7] "Deciding who wins and who loses [in the upcoming wars over water] will go far toward shaping the U.S. in the 21st century." *Id.* at 62.

[8] *See generally* Shea, *Coordination and Consensus in Water Resource Management*, 13 PAC. L.J. 975 (1980); Rhodes, *Developing a National Water Policy: Problems and Perspectives on Reform*, 8 J. LEGIS. 1 (1981).

[9] Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-419a (1982).

[10] Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982); National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982).

[11] Fish and Wildlife Coordination Act, 16 U.S.C. § 662 (1982).

[12] Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1982).

[13] "The federal government has little water law that resembles . . . state water law. The national government does not concern itself with the property rights of water users; it does not regulate the conduct of citizens or plan what they may do with water." Trelease, *Uneasy Federalism—State Water Law and National Water Uses*, 55 WASH. L. REV. 751, 755 (1980).

[14] *See infra* text and notes at notes 204, 285.

citizens to export ground water[15] to another state. In *Sporhase v. Nebraska ex rel. Douglas*,[16] the Court found that the Nebraska statute violated the Commerce Clause of the United States Constitution.[17] The *Sporhase* decision is important because it makes possible a significant shift in authority over water rights and distribution away from the states to the federal government. The decision is significant also in that the Supreme Court for the first time held that water, when moved from one state to another, constitutes an article of interstate commerce. The decision thus subjects to commerce clause analysis state statutes which restrict the interstate transfer of water.[18] *Sporhase* might thus be viewed as a first step toward total federal control over water use and water rights. Should water shortages reach crisis proportions, the issues may no longer be, can and will the federal government wrest control over water use from the states, but how and when it will do so.

The impact of *Sporhase*, however, might not be so dramatic. In an attempt to balance the states' strong interest in preserving water for its own citizens against the competing federal interest in the free flow of commerce among the states, the Court also found that states may still restrict or even prohibit water exports, so long as they do so in a "reasonable" manner. In order to discriminate against non-residents in the allocation of its water, a state must simply demonstrate sufficient need.[19] In relying on this type of balancing test, the case presents a useful example of how the Supreme Court uses the commerce clause to reconcile competing demands for diminishing natural resources. In addition, *Sporhase* may reveal problems inherent in the Court's application of traditional commerce clause analysis to areas of traditional state sovereignty.

Although the long-term impact of *Sporhase* is unclear, the Court's decision has already had an effect on the water resource management policies of a number of states. At the time of the *Sporhase* decision, fourteen Western states had statutes which

---

[15] Ground water is water below the surface of the earth, which is contained chiefly in pores and crevices of the rock mantle. 7 WATERS AND WATER RIGHTS 294 (R. Clark ed. 1976); *see generally* 1 WATERS AND WATER RIGHTS § 52.2 (R. Clark ed. 1967).

[16] 458 U.S. 941 (1982).

[17] U.S. CONST. art. I, § 8, c. 3. *See generally infra* text and notes at notes 25-61.

[18] 458 U.S. at 945-54.

[19] 458 U.S. at 954-58.

limited or prohibited the export of water.[20] Two embargo statutes were repealed,[21] and one statute was struck down by a federal district court,[22] since the Court's decision. A number of other statutes are at least as restrictive as the portion of the Nebraska statute struck down in *Sporhase*; successful enforcement of their provisions is unlikely.[23] Other statutes, however, will survive *Sporhase*, because the decision left the states some authority to restrict water exports.

This article will first briefly examine the limitations imposed on state police powers by the commerce clause. Second, it will review the development and nature of state water embargo statutes. Third, it will recount the Supreme Court's past decisions when faced with a commerce clause challenge to a state water embargo statute. Fourth, it will summarize the Supreme Court's decision in *Sporhase* and evaluate the likely impact of that decision on state water embargoes and on federal regulation of water. Fifth, this article will examine at length the possible arguments in support of removing water embargo[24] statutes entirely from the scope of the commerce clause. This discussion will focus on the state ownership theory, the argument that water is not an article of commerce, the exceptional police powers argument, the state as market participant exception, and the concept of state sovereignty. Finally, this article will conclude that although the Supreme Court was correct in finding that there are no available arguments which would entirely exempt water embargo statutes

---

[20] The statutes include: ARIZ. REV. STAT. ANN. § 45-153B (1956); COLO. REV. STAT. § 37-81-101 (Supp. 1980); IDAHO CODE § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. REV. CODES ANN. § 85-1-121 (1979); NEB. REV. STAT. §§ 46-233.01, -613.01 (1978); NEV. REV. STAT § 533.520 (1979); N.M. STAT. ANN. § 537.810 (1979); OKLA. STAT. ANN. tit. 82, § 1085.2.2 (West Supp. 1980); OR. REV. STAT. § 537.810 (1979); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1980); UTAH CODE ANN. § 73-2-8 (Supp. 1979); WASH. REV. CODE ANN. §§ 90.03.300, .16.110, .16.120 (1962); WYO. STAT. § 41-3-105 (1977).

[21] COLO. REV. STAT. § 37-81-101 (1973) (repealed 1983); WYO. STAT. § 41-3-105 (1977) (repealed 1983).

[22] N.M. STAT. ANN. § 72-12-19 (1978) (repealed 1983). *See* City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

[23] The embargo statutes of Idaho, Nevada, and Washington, for example, contain reciprocity provisions similar to the Nebraska provision struck by the Supreme Court in *Sporhase*, *see supra* text and notes at notes 141-157, and their continued vitality is doubtful. *See* IDAHO CODE § 42-408 (1977); NEV. REV. STAT. §§ 53.515, 53.520 (1979); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962).

[24] A water embargo, or anti-exportation statute, is a legislative prohibition or restriction of the individual landowner's ability to transfer water outside of the enacting state. *See infra* text and notes at notes 62-78.

from commerce clause treatment, the commerce clause is a clumsy tool with which to balance the complex, competing federal and state interests in this area. The more appropriate decision might have been to defer to the Congress to resolve this dispute.

II. THE COMMERCE CLAUSE LIMITATION ON STATE POLICE POWERS

The few words of the commerce clause belie the broad scope of its current authority. Article I, § 8 of the United States Constitution grants to Congress the power to "[r]egulate commerce with foreign nations and among the several states, and with the Indian tribes."[25] This language clearly arose from the framers' great concern that state-imposed trade barriers would impede the development of a unified nation.[26] Yet, during the two centuries that the Supreme Court has attempted to define the proper role of the Constitution in achieving national economic unity, the Commerce Clause has been interpreted in a variety of ways. While it is now generally accepted that the commerce clause plays a proper role both in delineating Congress's powers and in preserving the federalist system, the debate continues over the extent to which it enhances federal powers and limits those of the states.[27]

The contours of the commerce clause were first developed in *Gibbons v. Ogden*. There, the Supreme Court examined whether the commerce clause prohibited any state statute which conflicted with a federal statute enacted pursuant to the commerce powers of the Congress.[28] Chief Justice Marshall held that it did, despite the lack of any explicit prohibition in the language of the commerce clause against state regulation of commercial activities. The Chief Justice reasoned that "when a State proceeds to regulate commerce . . . among the several states, it is exercising

---

[25] U.S. CONST. art. I, § 8, c.3.

[26] H.P. Hood & Sons v. Dumond, 336 U.S. 525, 533-35 (1949); Baldwin v. G.A.F. Seelig, 294 U.S. 511, 521-23 (1935); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 244 (1978) [hereinafter cited as J. NOWAK]. In fact, the calling of the Constitutional Convention can be traced, in part, to the prevalence of trade barriers and economic warfare between the states. BROWNE & DUMARS, *State Taxation on Natural Resources Extraction and the Commerce Clause; Federalism's Modern Frontier*, 60 ORE. L. REV. 7, 11-12 (1981).

[27] *See e.g.*, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

[28] 22 U.S. (9 Wheat.) 1 (1824). In *Ogden*, the Supreme Court struck down a New York statute granting a steamboat license monopoly which conflicted with a federal licensing law.

the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[29]

The next great expansion of the commerce clause occurred in 1851 in *Cooley v. Board of Wardens*.[30] There, the Court first held that the commerce clause limited state action which burdened interstate commerce even in areas where Congress had not spoken.[31] In *Board of Wardens*, the Court found that it was the nature of the regulated activity, rather than Congressional presence, which determined whether state regulation violated the commerce clause. This was the birth of the "dormant" commerce powers of the Congress.[32]

The doctrine of the dormant commerce powers is based on the concept that the regulation of "commerce among the states" is primarily within the province of the federal government, and that absent Congressional authorization, the states may not encroach on Congress' constitutionally delegated authority. It recognizes that preventing parochial state legislation which has the effect of impeding the free flow of commerce among the states is as essential to a unified national economy as ensuring that the federal government has the authority to enact national commercial legislation.[33]

The dormant commerce powers of the Congress, however, do not bar all state actions which burden interstate commerce. Under the police powers,[34] states may regulate matters of local concern in pursuit of the health, safety, and the welfare of their citizens. Such regulation could, however, act as a barrier to interstate trade. For example, a state law limiting the length of trains

---

[29] *Id.* at 199-200.

[30] 53 U.S. (12 How.) 299 (1851). The Court upheld a Pennsylvania law requiring the hiring of local pilots for ships entering or leaving the port of Philadelphia. The Court distinguished subjects requiring uniform regulation , which could never be regulated by the states, from those better suited for local regulation. This distinction is no longer determinative. *See* J. NOWAK, *supra* note 22, at 250-66.

[31] *Board of Wardens*, 53 U.S. (12 How.) at 318-20.

[32] *Id.* at 319.

[33] *See* J. NOWAK, *supra* note 26, at 250-52.

[34] The police powers are not specifically provided for in the Constitution. Rather, the term police powers is used by the Supreme Court to describe "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all of which can be most advantageously exercised by the states themselves . Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824). *See generally* J. NOWAK, *supra* note 26, at 243-66.

which passed through its state, allegedly enacted to promote safety, burdened interstate rail transportation and was struck down.[35] Similarly, a city ordinance which required that all milk sold within its limits be pasteurized within five miles of the city, allegedly enacted to facilitate plant inspection, also had the effect of impermissibly excluding milk processed in neighboring states.[36] Commerce clause decisions, therefore, have focused broadly on reconciling the often conflicting police interest of the state, and the federal interest in the free interstate flow of commerce.

After *Board of Wardens*, the Court continued to delineate the permissible extent of state encroachment on interstate commerce by examining the nature of the regulated activity.[37] The Court employed, at various times, several different mechanical tests, including distinguishing subjects requiring national uniform regulation from those of local concern,[38] distinguishing production from commerce,[39] determining what falls within the "stream of commerce,"[40] and distinguishing activities having a direct versus an indirect effect on commerce.[41] None of these mechanical tests proved to be adequate, however, for the difficult task of reconciling conflicting state and federal interests.[42] These artificial approaches merely served to prevent the Court from resolving such conflicts in the manner it was straining toward: balancing the state interest in the regulation against the statute's burden on commerce.[43]

The approach currently taken by the Supreme Court in reconciling the competing interests of the state in effecting their police powers and the national interest in the free interstate flow of commerce can be traced back to Justice Stone's famous dissent in *Disanto v. Pennsylvania*.[44] Under the modern approach, first

---

[35] Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

[36] Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[37] *See* J. NOWAK, *supra* note 26, at 248.

[38] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[39] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[40] Swift & Co. v. United States, 196 U.S. 375 (1905).

[41] Hammer v. Dagenhart, 247 U.S. 251 (1918).

[42] J. NOWAK, *supra* note 26, at 250.

[43] *Id.* at 251.

[44] 273 U.S. 34 (1927). In *Disanto*, the majority struck down a Pennsylvania statute requiring sellers of steamboat tickets to pay a fee for an annual license. The Court found that the statute impermissibly regulated an activity requiring uniform national legislation. Justice Stone dissented, rejecting the Court's application of an expanded *Board of Wardens* test, in which the Court determines whether the subject area being regulated is

adopted by the Court in *Southern Pacific Co. v. Arizona*,[45] formalistic tests are rejected in favor of balancing the local benefits of the statute against the federal commerce interest. The modern balancing approach of the Court was summarized most succinctly in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits .... If a legitimate local purpose is found, then the question becomes one of degree and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[46]

As this quotation suggests, the Court considers four factors in determining the constitutionality of state regulations which impede interstate commerce: 1) whether the alleged purpose of the statute is "legitimate"—i.e., is within the state's police powers;[47] 2) whether the statute "effectuates" the alleged purpose;[48] 3) whether the statute treats residents and non-residents "evenhandedly";[49] and 4) whether the state has chosen the means

---

one requiring uniform or local regulation, and whether the burden on commerce is direct or indirect. Justice Stone argued that the *Board of Wardens* approach was too mechanical and theoretical. In his view, "those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines." 273 U.S. at 44 (Stone, J., dissenting).

Justice Stone's thesis was further developed by Professor Dowling in an article which greatly influenced the Court's approach to the commerce clause. *See* Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). Professor Dowling argued that the court should acknowledge that, rather than actually applying a mechanical test, what it was doing was "balancing national and local interest and making a choice as to which of the two *should* prevail." *Id.* at 21. Under his approach, the Court should weigh the local benefits of the statute against the national commerce interests. If the court upholds the statute, Congress can do nothing, and the statute remains; or it can regulate the area and displace the statute. If the court strikes down the statute, Congress can resurrect it by expressing its approval. *See generally* J. NOWAK, *supra* note 26, at 250-52.

[45] 325 U.S. 761 (1945).

[46] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[47] *See e.g., Sporhase*, 458 U.S. at 954-55.

[48] *Id.* at 955-56.

[49] *Id.*

to achieve the alleged purpose which has the least burdensome impact on interstate commerce.[50] Once these tests are satisfied, the Court will then balance the local benefits of the regulation against the burden on commerce, upholding the statute unless the latter is "clearly excessive." Legislation which on its face discriminates against non-residents, however, will be justified only by a much greater local interest, and could be invalid per se.[51]

States regulate commerce in a number of ways. There are statutes regulating transportation,[52] incoming commerce,[53] personal mobility,[54] and outgoing commerce. The last category includes embargoes on water and other natural resources. During the twentieth century, the Court generally has taken a dim view of state regulations limiting the export of a state's natural resources.[55] The Supreme Court has struck down, for example, regulations prohibiting or restricting the interstate trade of natural gas,[56] shrimp,[57] fishing rights,[58] minnows,[59] and rights to the use of waste disposal sites.[60] Explaining these decisions, the Court has specifically held that "[a] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the grounds that they are required to satisfy local demands or because they are needed by the people of the State."[61] Against this backdrop of Supreme Court opposition to natural resource embargoes, a state defending its water embargo statute would be forced to argue that water was somehow unique, and water use regulations should not be subjected to the same commerce clause scrutiny as embargoes of other natural resources. It would have to be argued that it is within the prov-

---

[50] *See e.g., Dean Milk Co.*, 340 U.S. at 354.

[51] *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[52] *See e.g., Southern Pacific Co.*, 325 U.S. 761.

[53] *See e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

[54] *See e.g.*, Edwards v. California, 314 U.S. 160 (1941).

[55] *See* Comment, *Commerce Clause Limits States' Ability to Stop Groundwater Exports: Supreme Court Overturns Nebraska Reciprocity Rule*, 12 ENVTL L. REP. (ENVTL L. INST.) 10083, 10086 (Sept. 1982).

[56] West v. Kansas Natural Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[57] Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

[58] Toomer v. Witsell, 334 U.S. 385 (1948); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

[59] Hughes v. Oklahoma, 441 U.S. 322 (1979).

[60] Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[61] *Foster Fountain Packing Co.*, 278 U.S. at 10.

ince of each state to protect the water within its boundaries for use by its own residents. Assuming this to be the case, many states have enacted embargo statutes; and for many years, these statutes went unchallenged.

III. WATER EMBARGO STATUTES

A. Development

The federal government does not regulate individual water rights.[62] Rather, each state has developed its own statutes and common law delineating the rights of landowners to the use of water on, under and adjacent to their land.[63] The laws of each state are tailored to coordinate the water needs of its citizens with the unique climactic, hydrological and topographical conditions of

---

[62] *See supra* note 13.

[63] With regard to ground water in particular, four basic doctrines exist which establish the individual's right to the use of water: 1) the rule of absolute ownership; 2) the reasonable use doctrine; 3) the correlative rights doctrine; and 4) the prior appropriation doctrine. Each Western state follows one or more of these doctrines.

The rule of absolute ownership grants the landowner the unlimited use of any ground water underneath his property. Once the law throughout the West, the absolute ownership doctrine was found to be inconsistent with the conservation policies of most Western states. It has therefore been rejected or substantially modified in all of the Western states except Texas.

In reasonable use states, when a dispute arises between landowners over the use of ground water, it is the job of the court to determine if either use is wasteful, or is not reasonable in relation to the use of the overlying land. The reasonable use doctrine, followed by Nebraska, Arizona, and Oklahoma, is better suited to conservation policies than the rule of absolute ownership.

The correlative rights doctrine, a variant of the reasonable use theory, differs from reasonable use in three ways: ground water may not be used on non-overlying land; water stored underground (i.e., water taken from a stream and stored in underground spaces made free by removal of the ground water) may be used exclusively by the owner of the overlying land; and, in times of shortage, water is allocated proportionally to land owners according to the amount of property owned. The correlative rights doctrine is followed in its entirety only by the State of California. The proportional allocation aspect of the doctrine is followed by Nebraska and South Dakota.

The prior appropriation doctrine invokes the use of a permit system. Permits for the use of ground water may be denied if the use of the water is deemed not to be "beneficial," the use of the water would interfere with an existing right to the water, or the granting of the permit would contribute to an existing shortage of water in the area. The prior appropriation doctrine is followed by California (in part), Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917, 923-27 (1980); *see also*, 1 WATERS AND WATER RIGHTS §§ 17-19.4 (R. Clark ed. 1967).

that state.[64] In the West, this means that water laws were designed to promote the conservation of scarce resources.[65]

What is now the western United States was once the "Great American Desert."[66] The development of this area required a constant and substantial supply of water,[67] and most of the Western states responded by taking steps to retain "their" water for use within their states. These states enacted statutes to achieve this goal,[68] and, in total, sixteen Western states[69] have at some time restricted the exportation of water.[70]

Statutes can restrict the export of water in varying degrees. California, in 1911, was the first state to enact a water embargo law, banning outright the export of water to another state.[71] Colorado, Nevada, and New Mexico have since enacted similar statutes, later amended, which imposed an "absolute" embargo on water exports.[72] A "discretionary" embargo, one which gives authority to a state administrative agency or the legislature to determine when water exports are permissible,[73] first appeared in 1921 with the enactment of a Montana statute prohibiting water exports without approval of the legislature.[74] Since that date, discretionary embargo statutes were enacted in Nebraska, Ore-

---

[64] 1 WATERS AND WATER RIGHTS § 4.1 (R. Clark ed. 1967).

[65] *See generally id.* at §§ 17-19.4.

[66] Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 641 (1957).

[67] *Id.*

[68] *See generally* Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249, 1251-53 (1981).

[69] In addition, the District of Columbia has enacted an embargo statute. *See supra* note 20.

[70] In addition to the fourteen statutes in force at the time of the *Sporhase* decision, *see supra* note 20, two states, California and Texas, enacted embargo statutes which were later repealed. *See infra* text and notes at notes 71, 75. For a discussion of the federal district court decision which lead to the repeal of the Texas statute, *see infra*, text and notes at notes 86-94. North Dakota is the only Western state never to have enacted an embargo statute.

[71] Act of Mar. 3, 1911, ch. 104, § 1, 1911 Cal. Stat. 271 (repealed 1917).

[72] Act of Mar. 30, 1917, ch. 151, § 1, 1917 Colo. Sess. Laws 539 (current version at COLO. REV. STAT. § 37-81-101 (Supp. 1980)); Act of Mar. 30, 1951, ch. 325, § 1, 1951 Nev. Stat. 543 (current version at NEV. REV. STAT. 53.515, .520 (1979)); Act of Mar. 19, 1953, ch. 64, § 2, 1953 N.M. Laws 108 (current version at N.M. STAT. ANN. § 72-12-19 (1978)). *See* Note, *supra* note 68, at 1252.

[73] For a description of the Nebraska discretionary embargo statute, *see infra* text and notes at notes 98-101.

[74] Ch. 220, § 1, 1921 Mont. Laws (current version at MONT. REV. CODE ANN. § 85-1-121 (1979)).

gon, Oklahoma, Wyoming, and Texas.[75] "Reciprocal" embargo statutes were first introduced by Arizona in 1919.[76] Such statutes permit the transfer of water only to states from which water can be imported. In addition to Arizona, Washington, Idaho, Kansas, Utah, and South Dakota enacted reciprocal embargo statutes.[77]

Although water anti-exportation statutes have taken various forms, they all raise the same question: to what degree may a state inhibit the flow of water in interstate commerce without running afoul of the commerce clause. It was not until eighty years after the enactment of the first embargo statute that the Court would thoroughly examine this issue in the *Sporhase* case.[78] This case did not, however, mark the first time that the issue had been before the Court. The following section will examine the two previous decisions in which the Supreme Court addressed whether water embargo statutes violate the commerce clause.

B. Early Constitutional Challenges

Prior to the *Sporhase* decision, the Supreme Court had twice addressed the constitutionality of state water embargo statutes. The Court's 1908 decision in *Hudson County Water Co. v. McCarter*[79] firmly established the right of the individual states to prevent the export of its water. Almost fifty years later, however, the Court, in *City of Altus v. Carr*,[80] summarily affirmed a district

[75] Act of May 19, 1953, ch. 161, § 1, 1953 Neb. Laws 504 (current version at NEB. REV. STAT. § 46-613.01 (1978)); Act of May 2, 1957, ch. 23, § 2(b), 1957 Okla. Sess. Laws 544, 545 (current version at OKLA. STAT. ANN. § 1085.2.2 (West 1981)); Act of May 12, 1951, ch. 593, § 1, 1951 Or. Laws 1053 (current version at OR. REV. STAT. § 537.810 (1979)); Act of Aug. 30, 1965, ch. 568, 1965 Tex. Gen. Laws 1245 (repealed by Act of Apr. 12, 1971, ch. 58, 1971 Tex. Gen. Laws 658); Act of Feb. 25, 1939, ch. 125, § 1, 1939 Wyo. Sess. Laws 212 (current version at WYO. STAT. ANN. § 41-3-105 (1977)). *See* Note, *supra* note 68, at 1252.

[76] Act of Mar. 26, 1919, ch. 164, § 15, 1919 Ariz. Sess. Laws 278, 284 (current version at ARIZ. REV. STAT. ANN. § 45-153B (1956))(the Arizona statute was later amended to become a discretionary statute. Note, *supra* note 68, at 1252 n.20).

[77] Act of Jan. 15, 1925, ch. 3, § 1, 1925 Idaho Sess. Laws 7 (current version at IDAHO CODE § 42-408 (1977)); Act of Mar. 4, 1976, ch. 435, § 1, 1976 Kan. Sess. Laws 1544 (current version at KAN. STAT. ANN. § 82a-726 (1977)); Act of Feb. 10, 1978, ch. 311, 1978 S.D. Sess. Laws 509 (current version at S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1980)); Act of May 13, 1941, ch. 96, § 1, 1941 Utah Laws 197 (current version at UTAH CODE ANN. § 73-2-8 (Supp. 1979)); Act of Mar. 16, 1921, ch. 103, § 31a, 1921 Wash. Laws 303, 305 (current version at WASH. REV. CODE ANN. §§ 90.03.300, .16.110, .16.120 (1962)). The Nebraska reciprocal embargo provision, struck down in *Sporhase*, was an amendment to the original statute. *See* Neb. Laws 1967, ch. 281, § 5, p. 761; Neb. Laws 1969, ch. 9, § 69, p. 144. Note, *supra* note 68, at 1252 n.21.

[78] *See infra* text and note at note 56.

[79] 209 U.S. 349 (1908).

[80] 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.* 385 U.S. 35 (1966).

court opinion striking down an embargo statute as violative of the commerce clause. *City of Altus* raised questions as to the continued vitality of *Hudson County*.

In *Hudson County*, the Supreme Court upheld the constitutionality of a New Jersey statute[81] which prohibited the export of any surface water located within the state. The Court rejected a number of arguments that the statute was unconstitutional, including a claim that it violated the commerce clause.[82] The majority opinion by Justice Holmes briefly disposed of the commerce clause argument, relying on the common law concept of state ownership of natural resources.[83] The Court held that the state owns all of the waters within its borders.[84] It therefore had special authority to regulate water use in ways which it could not regulate the trade of articles which are privately owned.[85] The New Jersey statute prohibiting the export of state-owned water did not, therefore, violate the commerce clause.

The Supreme Court next considered the effect of the commerce clause on state water embargoes in *City of Altus v. Carr*.[86] Anticipating future water shortages, the city of Altus, Oklahoma, contracted in November, 1964, to purchase ground water pumped from land located in Wicbarger County, Texas. In May, 1965, the Texas legislature approved a discretionary embargo statute which prohibited the exportation of ground water from Texas

---

[81] The New Jersey statute reads in part: "It shall be unlawful for any person or corporation to transport or carry . . . the waters of any fresh water lake, pond, brook, creek, river, or stream of this State into any other State for use therein." N.J. Laws of 1905, Chap. 238, p. 461, *cited in* Hudson County Water Co. v. McCarter, 209 U.S. 349, 353 (1908).

[82] Plaintiff in error, who had been enjoined from fulfilling a contract with New York City to supply 3,000,000 gallons of water a day to the borough of Richmond from the Passaic River, argued that the statute violated the commerce clause, impaired obligation of contracts, took property without due process, and denied equal protection. *Hudson County*, 209 U.S. at 350-52.

[83] The state ownership theory places ownership of all natural resources not yet "captured" by an individual with the state, not with the individual landowner on whose property the resource lies. *See infra* text and notes at notes 210-234.

[84] The court relied throughout its opinion on its earlier decision in *Geer v. Connecticut*, in which the Court developed and fully adopted the theory that the states own the natural resources within their borders. *See infra* text and notes at notes 213-221.

[85] The Court stated that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end." *Hudson County*, 209 U.S. at 357. Although the words of the Court are somewhat vague, the Court's citation to its earlier decision in Geer v. Connecticut, 161 U.S. 519 (1896), makes it clear that the Court is referring to the concept of state ownership. *See infra* text and notes at notes 213-221.

[86] 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

wells without the express approval of the legislature.[87] The statute prevented fulfillment of the contract, and the city of Altus brought suit in federal district court challenging the Texas statute as violative of the commerce clause. The District Court for the Eastern District of Texas found that the water embargo did place an unreasonable burden on interstate commerce, and in *City of Altus*,[88] the Supreme Court affirmed without opinion the decision of the lower court.

In *City of Altus*, the district court had distinguished the Texas statute from the New Jersey law upheld by the Supreme Court in *Hudson County* by noting the difference between New Jersey and Texas water law.[89] In New Jersey, the individual did not own the surface water flowing though his land, and therefore his rights to the use of the water were greatly limited.[90] Texas, however, had adopted the doctrine of absolute ownership[91] of ground water under which a landowner could use or sell all of the ground water he could extract from his land.[92] There was, therefore, no state ownership of Texas ground water. Rather, unlike the New Jersey statute, the Texas embargo statute operated to restrict the interstate movement of something which was privately owned, and therefore was an article of commerce. The district court concluded that *Hudson County* was therefore not controlling, and that the Texas statute impermissibly restricted the export of an article of commerce.[93]

Finally, the district court in *City of Altus* found that the alleged statutory purpose, water conservation, was not advanced by the Texas scheme, given the incongruous policy of permitting the

---

[87] The statute read, in full:

> No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an act of the Texas legislature and thereafter as approved by it.

TEX. REV. CIV. STAT. ANN. art. 74776 (Vernon Supp. 1965), *cited in City of Altus*, 255 F. Supp. at 830.

[88] City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

[89] *Id.* at 839-40.

[90] New Jersey followed a limited riparian water law system for the appropriation of surface waters, under which a landowner could divert water only a reasonable distance from a stream, and could only use the water for "well-known ordinary uses." The landowner was also restricted in the amount he could appropriate. *Hudson County*, 209 U.S. at 354.

[91] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).

[92] *See supra* note 63.

[93] 255 F. Supp. at 839-40.

unrestricted intrastate trade of Texas ground water. The court concluded that the purpose of the statute was to discriminate against non-Texans, and that it constituted an unreasonable burden on interstate commerce.[94]

The Supreme Court's summary affirmance of the district court's opinion in *City of Altus* was of little precedential value, indicating agreement with the result, but not necessarily the full reasoning of the lower court opinion.[95] In either case, by its own logic, the reasoning of the Texas District Court in *City of Altus* would not necessarily be applicable in a state like New Jersey which allowed its citizens only a limited property interest in water.[96] The district court in *City of Altus* expressly relied on the absolute ownership of ground water by Texas citizens to reach its result. As a result, *City of Altus* did not lead to the invalidation of any additional water embargo statutes. It did, however, leave the continued vitality of the statutes in doubt by indicating that the Supreme Court could later expressly find that water embargoes violate the principles of interstate commerce embodied in the commerce clause. The questions raised by *City of Altus* remained unanswered until the Supreme Court's decision in *Sporhase*, six years later. In *Sporhase*, the Court completed the reversal of *Hudson County* which it had begun in *City of Altus*.

IV. THE *SPORHASE* DECISION

In *Sporhase v. Nebraska ex rel. Douglas*, the Supreme Court considered the constitutionality of a trial court injunction prohibiting the export of ground water from Nebraska pursuant to the Nebraska embargo statute. The trial court had enjoined Joy Sporhase and Delmar Moss from pumping water without a permit[97] from their well in Chase County, Nebraska, for use on a contiguous tract of land which they owned in Phillips County, Colorado.

---

[94] *Id.* at 840.

[95] *Sporhase*, 458 U.S. at 949 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981)).

[96] Texas, in fact, is the only Western arid or semi-arid state which grants to its citizens a right of absolute ownership in water. *See supra* note 63.

[97] Had the defendants applied for a permit, their request would have been denied, because of the reciprocity provision of the Nebraska embargo statute. Under existing Colorado law, no water exports were permitted. *See infra* note 153. Thus, the Nebraska reciprocity provision prohibited water exports to Colorado. *See infra* text and notes at notes 99, 153.

The issue before the Supreme Court in *Sporhase* was whether Nebraska could continue to discriminate against non-residents in the distribution of water supplies by restricting or prohibiting its export, or whether the water embargo statute constituted an unreasonable burden on interstate commerce. In order to balance the state and the federal interests affected by the Nebraska embargo statute, the Court considered several factors, including the degree to which the state law restricted water exports, and the role of state water law in determining whether federal commercial interests are implicated by the embargo statute.

A. Nebraska Water Law

The Nebraska statute challenged by the appellants in *Sporhase* was not the most restrictive of the embargo statutes.[98] Ground water exports were not absolutely prohibited by Nebraska law, but under the embargo statute, a landowner was required to obtain the approval of the State Department of Water Resources (DWR) before ground water withdrawn in Nebraska could be used in another state. A permit would be granted if the requested withdrawal was reasonable, consistent with conservation policies, and not detrimental to the public welfare.[99] In addition, the statute contained a reciprocal embargo provision by which water could be exported only to states which permitted ground water transfers to Nebraska.[100] A landowner who failed to obtain a permit could be prosecuted and held subject to a fine, and/or ground water withdrawals could be enjoined until a permit was obtained.[101]

Relative to landowners of other states, a Nebraska landowner is fairly restricted in his rights to use water situated on his land.[102]

---

[98] Colorado, Nevada, and New Mexico, for example, all had statutes at the time which functioned as absolute embargoes on the export of water. *See supra* note 72.

[99] NEB. REV. STAT. § 46-613.10 (Reissue 1978). The statute reads:

> Any person . . . intending to withdraw ground water from any well or pit located in the state of Nebraska and transport it for use in an adjoining state shall apply to the department of water resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

[100] *Id.*

[101] NEB. REV. STAT. § 46-613.02 (Reissue 1978).

[102] For a thorough description of Nebraska ground water law, *see generally* Aiken, *supra* note 63.

In Texas, for example, a landowner has absolute ownership of all waters on or under his land.[103] The Nebraska Constitution, however, states that water is "dedicated to the people of the state for beneficial purposes," thereby indicating that there is no private ownership of water, just a right to use the water under or on one's land.[104] In addition, the Supreme Court of Nebraska has expressly rejected the absolute ownership doctrine in favor of a more restrictive hybrid rule containing elements of both the "reasonable use"[105] and "correlative rights"[106] doctrines. A landowner may withdraw water only if it is to be used on the overlaying land, and only if its use is "reasonable." Under the correlative rights aspect of the Nebraska rule, in the event of a water shortage, each user of the water must share with other users.[107]

The Nebraska landowner's water rights were thus strictly limited. It could be argued, therefore, that like the New Jersey statute upheld in *Hudson County*,[108] the Nebraska statute did not burden interstate commerce. Arguably, as the Supreme Court had held in *Hudson County*, because the water was publicly, not privately owned, such a scheme would not even regulate an article of commerce. Indeed, in *State v. Sporhase*,[109] the Nebraska Supreme Court adopted the latter proposition: that the Nebraska embargo statute did not impermissibly burden commerce, because it did not even regulate an article of commerce.

B. Nebraska Supreme Court Decision

In *State v. Sporhase*, appellants Sporhase and Moss argued that under *City of Altus v. Carr*, the Nebraska embargo statute ran afoul of the commerce clause. The state defended on the basis that, according to Nebraska ground water law, water belongs to the public, and is, therefore, not an article of commerce. In *State v. Sporhase*, the Nebraska Supreme Court agreed, affirming the trial court's order enjoining the defendants from irrigating their Colorado land with Nebraska water.[110]

---

[103] *See supra* note 63.

[104] NEB. CONST. art. XV, § 4. *See* Comment, *supra* note 55, at 10084.

[105] *See supra* note 63.

[106] *Id.*

[107] *See also* Prather v. Eisenmann, 200 Neb. 1, 5-7, 261 N.W. 2d 766 (1978); Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 800-01, 104 N.W.2d 626 (1966); State ex rel. Douglas v. Sporhase, 208 Neb. 703, 705, 305 N.W.2d 614 (1981).

[108] 209 U.S. 349 (1908). *See supra* text and notes at notes 79-85.

[109] 208 Neb. 703, 305 N.W.2d 614 (1981).

[110] 208 Neb. at 712, 305 N.W.2d at 620.

The court reviewed Nebraska ground water law and concluded that "[n]either the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce."[111] The court therefore distinguished *City of Altus* by pointing out that while under Texas law, ground water was an article of commerce, Nebraska ground water could not be freely traded intrastate, and was therefore not an article of commerce. The decision in *City of Altus* was thus determined not to be controlling.[112] The court found, on the other hand, that the Supreme Court's earlier decision in *Hudson County* upholding the New Jersey embargo statute *was* controlling. The court found that because the district court in *City of Altus* struck down the Texas statute by distinguishing *Hudson County*,[113] the Supreme Court's summary affirmance of *City of Altus* left the *Hudson County* decision intact. Ultimately, the court found that a state may, under its police powers, limit the export of its ground water without violating the commerce clause.[114]

The Nebraska Supreme Court also distinguished the Supreme Court's decisions limiting a state's authority to export other natural resources, such as natural gas[115] and minnows,[116] which could be reduced to private possession and freely traded.[117] Unlike Nebraska ground water, therefore, natural gas and minnows were not removed from the stream of commerce by state regulation and ownership. The Nebraska court also distinguished water from natural resources such as natural gas and minnows by finding that water is "the only natural resource absolutely essential to human survival."[118] Thus, the court concluded that because water is unique, in the way it is regulated and in its importance, restrictions on its trade are not subject to the same commerce clause limitations imposed on the regulation of other natural resources.

The Nebraska Chief Justice dissented in part, arguing that the reciprocity provision of the Nebraska decision was unconstitu-

---

[111] *Id.* at 707, 305 N.W.2d at 618.

[112] *Id.* at 708-09, 305 N.W.2d at 618.

[113] 209 U.S. 349 (1908).

[114] 208 Neb. at 709-10, 305 N.W.2d at 619.

[115] Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[116] Hughes v. Oklahoma, 441 U.S. 322 (1979).

[117] 208 Neb. at 709-10, 305 N.W.2d at 619.

[118] *Id.* at 710, 305 N.W.2d at 619.

tional. The issue, in the Chief Justice's opinion, was whether a citizen could be prohibited from transferring water interstate solely because the recipient state barred exports to Nebraska. The Chief Justice claimed that the provision violated the commerce clause because it was unrelated to the reasonableness of the export or any conservation policy.[119] Although the Chief Justice stood alone in his dissent, his reasoning and conclusion would reappear later in the opinion of the United States Supreme Court.

C. United States Supreme Court Decision

In *Sporhase v. Nebraska ex rel. Douglas*,[120] the United States Supreme Court reversed the decision of the Nebraska Supreme Court, in a majority opinion by Justice Stevens. The Court viewed the case as presenting two major issues. First, it had to determine whether Nebraska ground water was an article of commerce. If so, the Nebraska statute would be subject to commerce clause analysis. Second, if water embargo statutes were found to fall within the purview of the commerce clause, the Court would then have to determine whether the Nebraska statute unreasonably burdened interstate commerce.[121]

The State presented several arguments as to why its embargo statute did not in any way regulate commerce, and therefore could not be found to violate the commerce clause. The State argued that the Court's earlier decision in *Hudson County* was controlling, and, in addition, that Nebraska ground water should not be subjected to the same commerce clause scrutiny as other natural resources. Before examining the degree to which the Nebraska statute burdened interstate commerce, the Court first rejected the State's initial arguments that its embargo statute did not implicate the commerce clause.

1. Water as an Article of Commerce

The appellant Sporhase argued that *City of Altus v. Carr* was controlling, and that the Court should therefore find that, like the Texas statute in that case, the Nebraska embargo statute violated the commerce clause.[122] In response the Court initially noted

---

[119] *Id.* at 712-14, 305 N.W.2d at 620-21 (Krivosha, C.J., dissenting).

[120] 458 U.S. 941 (1982).

[121] *See infra* text and notes at notes 49-51.

[122] 458 U.S. at 947.

that its summary affirmance in *City of Altus* was not binding. First, the affirmance indicated agreement only with the result reached by the lower court, not necessarily the rationale behind it.[123] Second, the Court distinguished *City of Altus* by pointing out that because of state ground water laws, landowners in Texas had a much greater property interest in water under their land than did landowners in Nebraska.[124] According to the Supreme Court, the district court in *City of Altus* had, therefore, properly found Texas ground water to be an article of commerce.[125] Nebraska ground water, however, was distinguishable.

The Court also held, however, that its earlier decision in *Hudson County* was not controlling. *Hudson County* relied on the concept of state ownership of natural resources expressed in *Geer v. Connecticut* to uphold the New Jersey water embargo statute against a commerce clause challenge.[126] *Geer*, however, had been expressly overruled by the Supreme Court in *Hughes v. Oklahoma*.[127] In *Hughes*, the Court held that the state did not have a proprietary interest in natural resources under the state ownership theory. Rather, the theory indicated only that the state had a strong interest in conservation and preservation, giving rise to police powers necessary to regulate the use of natural resources.[128] The state ownership theory could not, therefore, be advanced for the proposition that a resource "owned" by the state was per se not an article of commerce.[129]

The Court was thus unpersuaded by the state's argument that because the Nebraska landowner possesses only a minimal ownership interest in ground water, Nebraska ground water is not an article of commerce. The Court held that this argument is based on the "fiction" of state ownership, noting that Nebraska water is freely transported from rural to urban areas under municipal water supply arrangements.[130] According to the Supreme Court,

---

[123] *Id.* at 949 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981)).

[124] *Id.*; *see supra* text and notes at notes 89-93, 111-12.

[125] 458 U.S. at 949-50.

[126] 458 U.S. at 950; (citing Hudson County v. McCarter, 209 U.S. 349 (1908)).

[127] 441 U.S. 322, 334 (1978); *see infra* text and notes at notes 227-34.

[128] 458 U.S. at 951 (quoting *Hughes*, 441 U.S. at 334, quoting *Toomer*, 334 U.S. at 402.

[129] *Cf.* 458 U.S. at 951.

[130] *Id.* The Nebraska Supreme Court had distinguished municipal water supply arrangements by finding that the water is sold at a price equal to the cost of distribution, which did not reflect the value of the water itself, and that therefore it was not really being sold in commerce. *State v. Sporhase*, 208 Neb. at 708, 305 N.W.2d at 618 (1981). The Supreme Court, however, dismissed this argument, finding that the rate structure was just price regulation. 458 U.S. at 951-52.

Nebraska ground water law, therefore, did not determine whether Nebraska ground water was an article of commerce.

The Court also rejected the reasoning of the Nebraska Supreme Court that water should be excluded from the scope of the commerce clause because it is the only natural resource necessary for human survival.[131] More important to the Court was that water plays a significant role in interstate commerce.[132] To remove its regulation from the restrictions of the commerce clause, the Court held, would effectively allow Nebraska to impermissibly regulate commerce which is interstate. This would also prohibit Congress from exercising its affirmative powers to regulate commerce among the states—a power which the Court emphatically believed to encompass interstate water transfers.[133]

Finally, the Court rejected the State's contention that Congress had exempted state regulation of water from commerce clause restrictions[134] by its repeated deferral to state water law when enacting federal water projects and similar legislation,[135] and by its

---

[131] *See* Brief of Appellee at 12, *Sporhase v. Nebraska*, 458 U.S. 941 (1982) [hereinafter cited as Brief of Appellee].

[132] The Court observed that 81% of U.S. water supplies are used for agriculture, and that sources of water such as the Ogallala Aquifer, which underlies appellant's land, transverse many state lines; these facts, in the Court's view, pointed out the significant role which ground water plays in interstate commerce. 458 U.S. at 953.

[133] 458 U.S. at 953 (citing Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978)). In striking down a New Jersey statute which prohibited the importation of most types of wastes, the Supreme Court in *Philadelphia v. New Jersey* held that to find that the transportation of valueless waste across state lines did not involve commerce would be to preclude Congressional regulation. In the Court's view, what is not commerce for purposes of state regulation may not be regulated by Congress under the Commerce Clause. Yet, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset . . . just as Congress has the power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." 437 U.S. at 621-23.

[134] The State urged that where "Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of congressional authorization is rendered invulnerable to Commerce Clause challenge." Brief of Appellee, *supra* note 131, at 21 (citing Wester and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981)).

[135] The State noted that in 37 federal statutes Congress deferred to state water law in implementing federal policies. For example, Section 8 of the Reclamation Act of 1902 states that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . ." Brief of Appellee, *supra* note 131, at 23 (quoting June 17, 1902 ch. 1098 § 8, 32 stat. 390, 43 U.S.C. § 383 (1982)).

approval of interstate water compacts.[136] The Court held that a valid exemption must be "expressly stated."[137]

Thus, having determined that the state ownership theory no longer provided unique authority to a state to regulate its natural resources, that water plays a significant role in interstate commerce, and that Congress had not exempted water from the scope of the commerce clause, the Court concluded that water is an article of commerce. State regulations which affect the interstate movement of water, therefore, are subject to commerce clause restrictions.

2. The Burdens to Benefits Test

Having concluded that water is an article of commerce, the Court went on to consider whether the Nebraska statute impermissibly burdened interstate commerce. Under the test summarized by the Supreme Court in *Pike v. Bruce Church, Inc.*,[138] the Court first determines whether the alleged purpose of the statute is legitimate. Second, it examines whether the statute effectuates the alleged purpose. Third, the Court determines whether the statute effectuates the purpose in an "evenhanded" manner which does not discriminate against non-residents. If the statute meets this three-part test, it would be upheld unless the burden on commerce is "clearly excessive" in relation to the local benefits flowing from the statute.[139]

The Court began by looking closely at the Nebraska statute. The statute comprised four separate requirements—that the water export 1) is reasonable, 2) is consistent with conservation policies, 3) is not detrimental to the public welfare, and 4) does not divert water to a state which does not permit water exports to Nebraska[140] (the reciprocal embargo provision). Assuming that

---

[136] Under Article I, section 10 of the United States Constitution, Congressional approval of all interstate compacts is required. "No State shall, without the consent of Congress . . . enter into agreement or compact with another state . . ." U.S. CONST. art. I., § 10, cl. 3. The State argued that by approving at least 23 interstate water compacts, including two compacts between Colorado and Nebraska involving water near Appellants' land, Congress had specifically deferred to the states in interstate water matters. Brief of Appellee, *supra* note 131, at 25-27.

[137] 458 U.S. at 961 (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982), quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946)).

[138] 397 U.S. 137, 142 (1970).

[139] *See supra* text and notes at notes 46-51.

[140] *See supra* text and notes at notes 98-101.

the first element of the *Pike* test was satisfied—that the purpose of the statute as a whole was legitimate—each requirement of the Nebraska statute would be given separate scrutiny under each of the remaining elements of the *Pike* test.

The Court first determined that the purpose of the statute, water conservation, was not only "legitimate," but also "highly important" and "genuine."[141] Second, it was found that the goal of conservation was promoted by the first three requirements of the statute—that the transfer be reasonable, not contrary to conversation goals and not otherwise detrimental to the public welfare.[142] The Court also found that the first three requirements did not violate the "evenhandedness" element of the *Pike* test. Although the statute applied only to interstate transfers, the Court held these provisions to be "evenhanded" because of the strict limits on intrastate transfers.[143]

Finally, the Court found the first three requirements of the statute to be reasonable in weighing the local benefits against the statute's burdens on interstate commerce. Here, several factors were found to weigh in favor of a limited discrimination against non-residents, although the Court had earlier found these factors insufficient to remove entirely embargo statutes from the scope of the commerce clause.[144] First, a state may, under its police powers, regulate the use of water in order to promote the health and safety of its citizens.[145] Second, both the Congress and the Su-

---

[141] 458 U.S. at 954-55. The Court observed that Applicant's land was located within a "critical" township, and was thus subject to strict user regulations, including ceilings on the amount of water which may be used for irrigation, well spacing requirements, and start limits on intrastate water transfers. *Id.*

[142] *Id.*

[143] *Id.*

[144] All of the factors were considered by the court in determining whether water was an article of commerce, except the "publicly produced" argument, which was not advanced by the State. *See* Brief of Appellee, *supra* note 131. Such an argument, however, could have been made by the State. *See infra* text and notes at notes 306-08. The Court's consideration of whether the other three factors exempt water embargoes from commerce clause limitations is discussed *supra*, text and notes at notes 126-37.

[145] 458 U.S. at 956. The Court noted that it has always distinguished health and safety regulation from economic protectionism. "This distinction between the power of the State to shelter its people from menaces to their health or safety . . . and its lack of power to retard, burden or constrict the flow of . . . commerce for their economic advantage, is one deeply rooted in both our history and our law." (H.P. Hood & Sons v. Dumond, 336 U.S. 525, 533 (1949)) (holding that New York could not deny a Massachusetts company a license to construct a milk processing facility because it would adversely affect New York milk producers.)

preme Court had sanctioned state restrictions on water exports through devices such as interstate compacts[146] and equitable apportionment decrees.[147] Thus, the Court admitted that state boundaries are relevant in the determination of water rights. Third, because Nebraska ground water does possess qualities of public ownership, Nebraska citizens may be given a limited preference in its distribution.[148] Finally, because of the State's conservation efforts, Nebraska ground water possesses some indicia of being publicly produced, which also justifies discriminating against non-residents in the distribution of this limited resource.[149] For these reasons, the Court concluded that the first three requirements of the statute—that the transfer be reasonable, consistent with conservation goals, and not detrimental to the public welfare—are reasonable.[150]

While the first three requirements of the Nebraska statute were upheld, the reciprocity provision did not fare as well. This provision, barring exports to states which prohibited exports to Nebraska,[151] had been determined to violate the commerce clause by the dissenting Nebraska Chief Justice in *State v. Sporhase*.[152]

---

[146] 458 U.S. at 956. Interstate water compacts are binding agreements between states establishing the water rights of each as to interstate waters. Congressional approval of interstate water compacts has been granted in at least 23 cases. *See supra* note 136. The Supreme Court has advocated the use of compacts to resolve interstate water disputes. *See* Colorado v. Kansas, 320 U.S. 383, 392 (1943); *see also* 2 Waters and Water Rights, § 133 (R. Clark ed. 1967).

[147] Equitable apportionment decrees arise out of decisions by the United States Supreme Court in which the Court apportions an interstate stream between two states by determining the amount which each may drain from the water each year. *See* 2 Waters and Water Rights, § 133 (R. Clark ed. 1967).

[148] 458 U.S. 956 (citing Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978)). In *Hicklin*, the Court considered the contitutionality of an Alaska statute requiring the Alaska residents be given hiring preference in the development of state-owned oil and gas fields under the privileges and immunities clause. The Court indicated that state ownership of resources justified some discrimination in favor of residents. (The Court held, however, that the Alaska statute exceeded the level of permissible discrimination). 437 U.S. at 534.

[149] 458 U.S. at 957. The Court has held that when a state itself acts as a participant in the marketplace, by selling its own resources or otherwise engaging in commerce in its own right, its activities may not implicate the commerce clause. *See* Reeves v. Stake, 447 U.S. 429 (1980), in which the Court stated: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others." 447 U.S. at 436 (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)); *see infra* text and notes at notes 297-309

[150] 458 U.S. at 957.

[151] *See supra* text and note at note 99.

[152] *See supra* text and note at note 119.

The Supreme Court determined that the reciprocity provision had to meet a stricter constitutional standard under the commerce clause. In the view of the Court, since Colorado forbade the export of its ground water,[153] the reciprocity requirement acted in this case as an explicit bar to water exports. The Court, therefore, concluded that such a statute was discriminatory on its face.[154] As a result, the State bore the burden of proving that the reciprocity provision was narrowly tailored to the asserted purpose of conservation, and that there were no adequate non-discriminatory alternatives.[155] Finding that the provision could prohibit the export of water from an area with abundant water supplies to an area in great need of water, the Court determined that the provision was not narrowly tailored to the purpose of conservation.[156] The reciprocity provision did not, therefore, survive the Court's strict scrutiny and was struck down. The Court mentioned in dictum, however, that a provision, or even an outright ban by an especially arid state, might be justified if the state could establish a close fit between the ban and the goal of conservation.[157]

Justice Rehnquist, joined by Justice O'Connor, dissented. The dissent noted that Congress may properly regulate activities having an effect on interstate commerce which do not themselves directly involve articles of commerce.[158] It is thus unnecessary, said Justice Rehnquist, to determine either that water is an article of commerce or that Congress may regulate it.[159] The dissent

[153] COLO. REV. STAT. § 37-90-136 provides that "it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, . . . into any other state for use therein." *Sporhase*, 458 U.S. at 957 n. 17 (quoting COLO. REV. STAT. ANN. § 37-90-136 (1973) (repealed 1983)).

[154] 458 U.S. at 957. The Court distinguishes those statutes which burden interstate commerce in effect from those which discriminate against non-residents or their face. The latter require strict scrutiny by the Court. *See, e.g.*, Hughes v. Oklahoma., 441 U.S. 322, 337 (1979); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

[155] *See Hughes*, 441 U.S. at 337.

[156] 458 U.S. at 957-58.

[157] *Id.* at 958.

[158] *Id.* at 961 (Rehnquist, J., dissenting). The dissent cited Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (Employees' maintenance of buildings whose tenants produced goods destined for commerce was also commerce, so that they were protected by the Fair Labor Standards Act); United States v. Darby, 312 U.S. 100 (1941) (manufacturing goods destined for interstate commerce is commerce); Houston & Texas RR v. United States, 234 U.S. 342 (1914) (Congress may regulate wholly intrastate rail transportation if necessary to regulate interstate transportation); Wickard v. Filburn, 317 U.S. 111 (1942) (Congress could limit wheat production for home consumption under the Agricultural Adjustment Act because the demand for wheat in commerce was subsequently decreased).

[159] 458 U.S. at 961 (Rehnquist, J., dissenting).

also argued that because of the unique nature of water—its importance to the state and the way it is regulated—it was inappropriate for the Court to balance the State's interest against the burden on commerce under a traditional commerce clause approach.[160] He pointed out that the Court in earlier decisions[161] established that a state has unique authority in its quasi-sovereign capacity to regulate water in a manner that it would become commerce[162]—by denying landowners a right of ownership in water, and by forbidding its sale through the normal channels of commerce. The dissent concluded that because Nebraska regulated ground water in a way that the landowner enjoyed only a limited usufructuary right,[163] the water does not enter the stream of commerce.[164] Justice Rehnquist did not then go on to determine whether in this case interstate commerce was affected by the statute, but rather, concluded somewhat obliquely that because Nebraska ground water was not an article of interstate commerce, the Nebraska statute was a constitutional exercise of Nebraska's police powers.[165]

Justice Rehnquist, therefore, believed that all water embargoes

---

[160] *Id.* at 962-63.

[161] The dissent cited Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), and Kansas v. Colorado, 185 U.S. 125 (1902). In *Georgia*, the majority stated:

> This is a suit by a State for an injury to it in its capacity as *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

485 U.S. 962 (Rehnquist, J., dissenting, quoting *Tennessee Copper*, 206 U.S. at 237) (holding that Georgia could enjoin Tennessee corporations from discharging pollutant air over Georgia's land). In Kansas v. Colorado, the Court held that a "State's quasi-sovereign interest in the flow of . . . water within its borders [is] of the same magnitude as its interest in pure air or healthy forests." *Sporhase*, 458 U.S. at 963 (Rehnquist, J., dissenting) (citing Kansas v. Colorado, 158 U.S. at 142, 145-46).

[162] 458 U.S. at 963 (Rehnquist, J., dissenting).

[163] A usufructuary right is the right to enjoy a thing in which one does not have a property right. BLACK'S LAW DICTIONARY 1384 (5th ed. 1979).

[164] 458 U.S. at 964-65 (Rehnquist, J., dissenting). Justice Rehnquist noted that: "Nebraska landowners do not have a right of absolute ownership of water; they are limited to reasonable and beneficial use; sharing water is required during periods of drought; they may not transfer water intrastate; and if in a "critical area," landowners are subject to additional irrigation and well placement restrictions."

[165] *Id.* at 965 (Rehnquist, J., dissenting). Justice Rehnquist's conclusion that if water is not an article of commerce then the Nebraska statute does not burden commerce is curious in light of his acknowledgment that "Congress may regulate not only the stream of commerce itself, but activities which affect interstate commerce . . ." 458 U.S. at 961 (Rehnquist, J., dissenting).

were consistent with the requirements of the commerce clause, so long as the state regulates intrastate water rights in a manner that entirely removes water from the stream of commerce. Although the majority differed with the dissent's position, which would uphold virtually all embargo statutes, the Court's opinion still leaves the states considerable authority to restrict the flow of water from its borders. In striking only the reciprocal embargo provision of the Nebraska statute, the Court appears to have recognized that a state's exceptional interest in preserving the water within its boundaries justifies some amount of discrimination against non-residents in its distribution. Exactly how much discrimination will be permitted is not entirely clear from the Court's opinion.

D. The Impact of Sporhase

1. The Effect of *Sporhase* on State Embargo Statutes

The *Sporhase* opinion was much narrower than the sweeping decision anticipated and feared by Western water resource managers. Many were concerned that the Supreme Court was prepared to end two centuries of state primacy over ground water.[166] The opinion, in fact, left the states considerable authority over ground water regulation.[167] The Court, however, was emphatic in its belief that ground water is properly a subject for Congressional regulation under the commerce clause,[168] and thus found it necessary to hold that ground water is an article of commerce.[169] Nevertheless, the Court also exhibited great reluctance to cut very deeply into the states' power to regulate water[170]

---

[166] *See* Comment, *supra* note 55, at 10087.

[167] *See generally, Sporhase v. Nebraska: Hearings on S. 1844 before the Subcommittee on Water Resources of the Senate Committee on Environment and Public Works*, 97th Cong., 2nd Sess. (1982) (statement of Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, Department of Justice [hereinafter cited as Dinkins Statement]; *Sporhase v. Nebraska: Hearings on S. 1844 Before the Subcommittee on Water Resources of the Senate Committee on Environment and Public Works*, 97th. Cong., 2nd Session (1982) (statement of Dr. Thomas Bahr, Director of the Office of Water Policy, Department of the Interior) [hereinafter cited as Bahr statement]; Comment, *supra* note 55, at 10087.

[168] 458 U.S. at 953-54.

[169] *Id.*

[170] The Court's decision appears to address both ground and surface waters. *See* P. Baldwin, *Sporhase v. Nebraska* 10 (July 27, 1982)(unpublished manuscript prepared for the American Law Division, Congressional Research Service, Library of Congress).

exports for conservation purposes, and if necessary, to regulate in such a manner that preference may be given to residents over non-residents. In upholding the first three requirements of the Nebraska statute—that the transfer be reasonable, consistent with conservation goals, and not detrimental to the public welfare,[171]—the Court held that a state could continue to claim a property interest in its water. Although this in itself was insufficient to remove the water from commerce clause restrictions, the holding justified export restrictions which discriminate against non-residents.[172]

The extent of the discrimination which will be permitted under the *Sporhase* decision, however, is unclear. Of the three types of water embargoes—absolute, discretionary, and reciprocal[173]—only discretionary embargoes retain any significant chance of surviving a commerce clause challenge. Only in extreme cases would absolute embargoes be upheld,[174] and reciprocal embargoes would almost certainly never pass constitutional muster under the Court's decision in *Sporhase*.

Like the reciprocity provision of the Nebraska statute, any absolute embargo on water exports would have to meet the strict scrutiny test imposed on commercial legislation which is discriminatory on its face.[175] Thus, the state would have to establish that the embargo statute had a legitimate purpose, was narrowly tailored to achieve that purpose, and that there were no adequate non-discriminatory alternatives.[176] As in *Sporhase*, it is the "narrow tailoring" requirement which would defeat most absolute embargoes. The Court noted that a sufficiently "close means-ends relationship"[177] between an absolute embargo and statutory purpose might exist in "a demonstrably arid state,"[178] suffering a "severe shortage."[179] In addition, in order to successfully assert

---

[171] 458 U.S. at 956.

[172] *Id.*

[173] *See supra* text and notes at notes 71-77.

[174] The Court in *Sporhase* struck down a reciprocity requirement, not an export ban. It treated the provision as if it were an outright prohibition on exports, however, because with regard to exports to Colorado, the provision did serve as a ban. This portion of the Court's opinion is therefore useful in determining how outright embargoes would be viewed by the Court. The Court also discussed in dictum under what circumstances absolute water embargoes could withstand a commerce clause challenge. 458 U.S. at 958.

[175] *Sporhase*, 458 U.S. at 957; *Hughes*, 441 U.S. at 337.

[176] *Hughes*, 441 U.S. at 337.

[177] 458 U.S. at 958.

[178] *Id.*

[179] 458 U.S. at 956.

conservation as the purpose of the embargo, the state would have to impose similarly severe restrictions on intrastate water use. This would not only help to establish a "close fit," but would be necessary to justify the "evenhandedness" requirement of the *Pike* test[180] as well. Third, a state with an absolute embargo would have to establish that the embargo was necessary for reason of health, not economy.[181] The embargo of any water beyond that necessary for the survival and health of its citizens would undoubtedly be subjected to the same commerce clause standards as the embargo of any other natural resource, and struck down as economic protectionism. Finally, in order to save its water for its own citizens, the state would have to establish that it suffers a state-wide water shortage, and that the intrastate transport of water to arid areas was "feasible,"[182] i.e., the water would not be better used outside of the state.

In the only decision since *Sporhase* to have considered the constitutionality of an embargo statute, the Federal District Court for the District of New Mexico applied these standards in striking down the New Mexico absolute embargo statute.[183] In *City of El Paso v. Reynolds*,[184] the court found that the purpose of the New Mexico statute was not to protect the health of its citizens, but to preserve the embargoed water for intrastate economic development.[185] In addition, the court held in dictum that even if the purpose of the statute was public health, the narrow tailoring requirement of the commerce clause test would not be met because "there [was] no present or imminent shortage of water in New Mexico for health and safety needs."[186] The court also held that the statute failed to meet the "evenhandedness"

---

[180] *Id.*; *supra* text and note at note 49.

[181] The *Sporhase* Court held that "a State's power to regulate the use of water in times and places of shortage for the purpose of the health of its citizens—and not simply the health of its economy—is at the core of its police power." 458 U.S. at 956.

[182] 458 U.S. at 956.

[183] The statute, N.M. STAT. ANN. § 72-12-19 (1978), contains a minor exception for the transportation of underground water by tank truck for use in oil and gas developments.

[184] 563 F. Supp. 379 (D.N.M. 1983).

[185] The court found that "the [*Sporhase*] Court held that a state may discriminate in favor of its citizens only to the extent that water is essential for human survival. Outside of fulfilling human survival needs, water is an economic resource. For purposes of constitutional analysis under the Commerce Clause, it is to be treated the same as other natural resources." 563 F. Supp. at 389. The court then found that the intra-state uses for which New Mexico was to preserve its water—including use by municipalities, industry, agriculture, etc.—were related to economic activities. *Id.* at 390.

[186] *Id.*

requirement of the *Pike* test because of the liberal rules for in-state water use.[187] Finally, the district court narrowly construed the Supreme Court's requirement that the intrastate transportation of the embargoed water to dry areas be "feasible."[188] The court held that *Sporhase* mandates that the state have *current* plans to use the water in arid parts of the state,[189] and that the plans be feasible, both from an engineering and an *economic* standpoint, at that time.[190] Only then would an absolute embargo survive a commerce clause challenge. Failing to meet any of these tests, the New Mexico statute was struck down.[191]

The third type of embargo statute, prohibiting exports to a state which itself prohibits exports, will probably be eliminated entirely as a result of the *Sporhase* decision. Where a reciprocal embargo acts as an absolute embargo because the point of diversion is within a state which did not permit water exports, the statute would be treated like an absolute embargo statute under commerce clause analysis.[192] In addition, the state would bear the additional burden of establishing that the reciprocity requirement bore a close means-ends relationship to the purpose of conservation.[193] This would almost certainly prevent any reciprocal embargo from surviving a commerce clause challenge. Since any reciprocity provision might serve to prevent the exportation of water from an area of abundance to one that is dry,[194] the "close fit" requirement might never be met.

Thus, of the three types of embargo statutes, only discretionary embargoes[195] remain relatively safe from commerce clause challenge. Where the statute establishes standards to be followed by the permitting authority, like the first three provisions of the Nebraska statute upheld in *Sporhase*, the statute would be upheld so long as: 1) the statutory criteria used were not barred by Congressional action;[196] 2) it can be established that the standards effectuate a legitimate state purpose such as conservation;[197] and

---

[187] *Id.* at 391.
[188] *Sporhase*, 458 U.S. at 958; *see supra* text and note at note 182.
[189] 563 F. Supp. at 391.
[190] *Id.*
[191] *Id.* at 391-92.
[192] *Cf. Sporhase*, 458 U.S. at 957.
[193] *Id.*
[194] *See Sporhase*, 458 U.S. at 957-58.
[195] *See supra* text and notes at notes 73-75.
[196] *Cf. Sporhase*, 458 U.S. at 956.
[197] *Id.* at 954-55.

3) the statute regulates "evenhandedly" in that interstate transfer requirements are not significantly more stringent than limitations on intrastate water use.[198] Where total discretion is granted to the permitting authority,[199] presumably, the same standards would be applied to the criteria employed by the administrator.

The short-term effect of the *Sporhase* decision on state authority over water exports might be described as significant but limited. A state's water can no longer be absolutely preserved for its own citizens beyond that necessary for public health. In upholding the discretionary embargo provisions of the Nebraska statute, however, the Court made it clear that the Western states' extraordinary interests and competence in water conservation are factors to be considered in weighing the reasonableness of an embargo statute,[200] and justify a limited discrimination against non-residents.[201] The decision, however, not only restricted the states' authority over water rights, but also affirmed the Congress' complete commerce powers over water. Federal domination in this area, therefore, is made possible by the *Sporhase* decision. It is unlikely, however, that Congress would fully exercise its authority in this area in the near future.

2. The Effect of *Sporhase* on Federal Water Policy.

The *Sporhase* decision clearly states that water is an article in interstate commerce which may be regulated by Congress.[202] This being so, Congress presumably could bar all export restrictions, or even preempt entirely state water law.[203] Several factors, however, work against the likelihood of this occurring in the near future. First, as pointed out by the appellee-state in *Sporhase*, Congress has in the past consistently deferred to the states in matters of water management.[204] Although there is some move-

---

[198] *Id.* at 954, 956.

[199] *See e.g.*, R.I. GEN. LAWS § 46-15-9, which grants total discretion in the State Water Resources Board.

[200] *Sporhase*, 458 U.S. at 953.

[201] *Id.*

[202] 458 U.S. at 953-54.

[203] Under the Court's expansive view of "commerce," Congress may regulate even wholly intrastate activities which have an indirect impact on interstate commerce. *See supra* text and note at note 158.

[204] Brief of Appellee, *supra* note 131, at 22-25. Appellee argued that: "The history of the relationship between the Federal government and the States in the reclamation of the

ment in Congress toward recognizing that federal action may be necessary to cope with decreasing water supplies, there is no indication that this movement will not also embrace the concept of state sovereignty over water.[205] The Reagan administration, in fact, has expressed opposition to the federal government's exercising its authority over water use, and strongly favors continued deference by the federal government to the states.[206]

In addition, extensive federal regulation of individual water rights in the near future may be politically unfeasible. It is unlikely that such a change would be approved by either house of Congress, particularly the Senate where the Western states represent a united and powerful voting block.[207] Furthermore, given that water is one of the most sensitive political issues in the West, any presidential candidate would be very reluctant to endorse such legislation.[208]

Thus, the impact of the *Sporhase* decision, both short and long-term, is likely to be fairly limited. States retain considerable authority to conserve water through restricting exports. In addition, Congressional authority to regulate water will probably remain largely untapped, at least in the near future. Only the reciprocity provision of the Nebraska statute was struck down, and the decision was generally supportive of the states' ability to conserve water resources by limiting exports.

The question remains, however, whether the Court could have

---

arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 22-23 (quoting California v. United States, 438 U.S. 645, 653 (1978)).

[205] *See generally* Rhodes, *Developing a National Water Policy: Problems and Perspectives on Reform*, 8 J. LEGIS. 1 (1981).

[206] Dr. Thomas Bahr, Director of the Office of Water Policy of the Department of the Interior, has already testified that:

> [T]he Administration is strongly committed to state primacy on water issues. While some may view the *Sporhase* decision as an opening or pretext for an expanded Federal presence in ground water management, we reject such counsel and will vigorously oppose efforts to intrude Federal authority into an area that shall continue to be reserved to the states.

Bahr Statement, *supra* note 167.

[207] The Western Senators would likely be joined by many Southern members whose interests in States' rights often rise above all else.

[208] It should be noted that Congress could modify the Supreme Court's holding in *Sporhase* by limiting a state's vulnerability to commerce clause challenges of export bans. Legislation could be enacted which would either 1) establish guidelines as to what types of state export restriction were permissible, 2) authorize pursuant to the commerce clause all existing state export restrictions, or 3) spur the formation of interstate compacts. *See* Dinkins Statement, *supra* note 167.

somehow found that a state should retain complete authority over the water within its borders. Specifically, some commentators argue that by finding water to be an article of commerce, the Supreme Court in *Sporhase* failed to properly respect unique water interests in water resources.[209] Accordingly, although the Court's commerce clause analysis clearly grants states considerable authority to discriminate against non-residents in the distribution of water, the question remains whether the state water statutes should be subjected to commerce clause restrictions at all.

Many arguments can be made in support of the proposition that water is unique and should remain entirely within the states' control. Yet, only one, the state ownership argument, was really considered by the Court; and even in this regard, several important questions raised by the state ownership argument were left unanswered. Most significantly, the Court failed to adequately explain the concept of state ownership, and why it fails to empower a state to impose greater burdens on the interstate trade of natural resources than other articles of commerce.

The *Sporhase* Court's finding that water should be treated as an article of commerce may have been proper. Nevertheless, the degree to which the decision will aid future litigants and courts considering the constitutionality of state regulations of water and other natural resources is limited. The utility of *Sporhase* is hampered by the failure of the Court to thoroughly consider many of the important issues raised by examining whether water is an article of commerce. Yet *Sporhase* will undoubtedly be relied upon not only to determine the constitutionality of all water embargo statutes, but all statutes designed to foster resource conservation, which also restrict interstate commerce. An examination of these issues not treated by the Court, or treated by the Court in a cursory manner, is therefore necessary.

V. IS WATER DIFFERENT? POSSIBLE COMMERCE CLAUSE EXEMPTIONS

At least five arguments can be advanced in support of the proposition that the regulation of water rights by the states should be exempt from commerce clause scrutiny. These include

---

[209] *See e.g.*, Tarlock, *So It's Not "Ours"—Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER LAW REV. 137 (1983).

arguments that: 1) the state ownership theory exempts water regulation from commerce clause restraints; 2) water is not an article of commerce; 3) states have exceptional police powers to regulate water; 4) the state is acting as a market participant, not a regulator, in allocating its water; and 5) the concept of state sovereignty prohibits federal regulation of individual water rights. Although some of the arguments raise significant issues unaddressed by the *Sporhase* Court, ultimately none is adequate to protect entirely water embargo statutes from commerce clause scrutiny. These arguments will now be examined in detail.

A. The State Ownership Theory

The state ownership argument takes two forms: first, it is argued that state ownership of water brings to the state special authority to regulate water use in a manner which might otherwise violate the commerce clause;[210] and second, because citizens lack a property interest in water and are forbidden from selling it in regular channels of commerce, water cannot be considered an article of commerce.[211]

1. The Rise of the State Ownership Theory

The roots of the state ownership theory can be traced back several centuries to the ancient common law of Western Europe.[212] The theory was first fully adopted and applied in this country in the seminal case of *Geer v. Connecticut*.[213]

In *Geer*, the defendant was convicted of attempting to export woodcock, ruffled grouse, and quail in violation of a Connecticut statute which forbade the export of game birds killed within the state.[214] The Supreme Court rejected the contention that the Connecticut statute violated the commerce clause, because the state traditionally has had the authority to regulate the taking of wild animals.[215] The Court examined at great length the ancient and

---

[210] *See, e.g.*, Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). *See also supra*, text and notes at notes 81-83.

[211] *See, e.g.*, Brief of Appellee, *supra* note 131, at 12-15.

[212] *See infra* note 216.

[213] 161 U.S. 519 (1896).

[214] The statute reads (in full): "No person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this state; or shall transport or have in possession, with intent to procure the transportation beyond said limits, any of such birds killed within this state." *Id.* at 519 (citing CONN. GEN. STAT. § 2546 (Revision of 1888)).

[215] 161 U.S. at 522.

feudal law approach to property rights in wild animals and natural resources, finding that,"the right to acquire animals *ferae naturae* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control."[216] The Court then found that this authority passed from England to the Colonies and from the Colonies to the States,[217] and that the Connecticut statute was a legitimate attempt to conserve wild animals for use by Connecticut residents.[218] The Court went on to reject the argument that because the State permitted the free trade of game birds intrastate, that the birds were articles of commerce protected in interstate trade by the commerce clause. The embargo statute was held to remove from the game the essential attributes of an article of commerce, including the freedom of contract and full ownership.[219]

The breadth of the *Geer* decision indicated that the states had

---

[216] *Id.* at 523. The Court noted the observation of Pothier, author of TRAITE DU DROITE DE PROPRIETE, that:

> [i]n France, as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who, being *in naturali lexitate*, belong to no person in particular. The sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons.

Id. at 524 (quoting Pothier, TRAITE DU DROITE DE PROPRIETE, nos. 27-28.) The Napoleonic codes, articles 714 and 715, stated that "[t]here are things which belong to no one, and the use to which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." 161 U.S. at 526. The 18th century legal philosopher Blackstone also observed that:

> . . . there are some few things which . . . must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air and water, which a man may occupy by means of his windows, his gardens, his mill and other conveniences; and such are also the generality of those animals which are said to be *ferae naturae*.

116 U.S. at 526 (quoting 2 W. BLACKSTONE, COMMENTARIES *14). With regard to the regulation of the taking of game, Blackstone said that:

> [B]y the law of nature every man from the prince to the peasant has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae* . . . [b]ut it follows from the very end and constitution of society that this natural right as well as many others . . . may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community.

161 U.S. at 527 (quoting 2 W. BLACKSTONE, COMMENTARIES *410).

[217] 161 U.S. at 527-28.

[218] *Id.* at 529.

[219] *Id.* at 530.

complete authority over all wild animals and other natural resources.[220] It was therefore appropriate for courts to rely on *Geer* in upholding state natural resource embargoes, as did the Supreme Court in *Hudson County* in dismissing the commerce clause challenge to the New Jersey water embargo statute.[221]

2. The Demise of State Ownership

Soon after the *Geer* decision, however, the Court began to cut back on the concept of state ownership. First, in *West v. Kansas Natural Gas Co.*,[222] the Court found that the state ownership theory did not protect a state statute prohibiting the export of natural gas from a commerce clause attack. The decision greatly limited the applicability of the state ownership theory to natural resources.[223] Then, in a series of decisions in which the extent of state authority over wild animals was considered, the Court continued to narrow the concept of state ownership.[224] Eventually,

---

[220] *See supra* note 183.

[221] *See supra* text and notes at notes 79-85.

[222] 221 U.S. 229 (1911).

[223] In *West*, the Court rejected an argument that under the state ownership theory, Oklahoma could prohibit the export of natural gas. The Court found that although natural gas did have some qualities of public ownership, Oklahoma could not allow its citizens to freely sell the resource intrastate while forbidding its trade in interstate commerce. The free intrastate trade of gas required that the Court treat Oklahoma gas as an article of commerce. The Court, however, distinguished natural gas from wild animals which, under *Geer*, could be barred from interstate commerce, even though they were freely traded intrastate. Gas was found to be less of a public property than *ferae naturae* because, while the latter could be possessed and owned by all, the former could be owned by the landowner only. The Court reasoned that the state's control decreased along with the level of public ownership of the resource.

Concluding that the purpose behind the statute was regulation of commerce and not conservation, the Court held that such statutes are inconsistent with the concept of a national economy embodied in the commerce clause. The Court then distinguished this case from Hudson County v. McCarter, 109 U.S. 349 (1908), finding first, that unlike the regulation of natural gas, the preservation and regulation of water is one of the most important functions of government. Second, the Court found that landowners enjoyed only a limited property right in water, whereas Oklahoma gas was owned outright by the landowner. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[224] In Missouri v. Holland, 252 U.S. 416 (1920), decided 24 years after *Geer*, the Court upheld the authority of the United States to limit the hunting of certain migratory birds as authorized by legislation implementing a U.S.-Canadian treaty. In a decision by Justice Holmes, author of the *Geer* opinion, the Court rejected a tenth amendment challenge to the statute. The decision indicated that the concept of state ownership may not significantly enhance the police powers of the state. In the words of Justice Holmes, "[t]o put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." 252 U.S. at 434.

the Court found the state ownership theory to be merely a "legal fiction" for the states' exceptional police powers over vital resources.[225] A state's claim of ownership would, therefore, be deemed insufficient to exempt an embargo statute from commerce clause scrutiny.[226]

Finally, in 1979, the Court expressly overruled *Geer*, and in doing so dealt the final blow to the concept of state ownership, at least with respect to wild animals. In *Hughes v. Oklahoma*,[227] the Court found that a state statute which prohibited the export of minnows taken from state waters violated the commerce clause.[228] After tracing the gradual erosion of the *Geer* decision,[229]

In Foster-Fountain Packing Co., Inc. v. Haydel, 278 U.S. 1 (1928), the Supreme Court held that a claim of state ownership did not protect a Louisiana statute which allowed the free trade of shrimp within Louisiana, but prohibited their export until the head and tail had been removed. The Court looked beyond the apparently broad authority over natural resources given to the states by *Geer*, and examined the actual purpose of the statute, as well as the possessory rights of Louisiana citizens over shrimp. The Court first held that because Louisiana citizens could eventually export all captured shrimp, the real purpose of the statute was not to conserve the resource, as claimed by the State, but to ensure that the shrimp were processed within the state—an impermissible objective under the commerce clause. In addition, the Court held that because the State did permit the interstate trade of all parts of the shrimp after processing, it released its claim to ownership or trusteeship of the shrimp, which was effectively transferred to the citizen and perfected when the shrimp was captured. *Id.*

The state ownership theory received an even greater blow from the Court's decision in Toomer v. Witsell, 334 U.S. 385 (1948). In *Witsell*, the Court made clear that a state's special authority over its natural resources would no longer in itself justify burdens on interstate trade. In striking down several South Carolina statutes which limited nonresidents' rights to fish in South Carolina waters, the Court held that:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource and there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

Id. at 402. More recently, the Court elaborated on *Witsell*, holding pragmatically that:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fanatasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977).

[225] Toomer v. Witsell, 334 U.S. 385, 401 (1948).

[226] *Id.*

[227] 441 U.S. 322 (1979).

[228] *Id.* at 323-24 n.1 (citing OKL. STAT, tit. 29, § 4-115(13)). The statute reads in relevant part: "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . . ."

[229] 441 U.S. 329-35.

the Court held that state regulations of wild animals which burden interstate commerce should be evaluated according to the standards applied to regulations burdening the trade of other natural resources.[230] The Court applied the *Pike v. Bruce Church, Inc.* balancing test to determine whether the statute violated the commerce clause.[231] Finding the statute to be facially discriminatory,[232] the Court rejected the argument that the statute was a legitimate effort to conserve natural resources. The Court held that state ownership could no longer be advanced to justify discriminating against non-residents in the name of conservation when non-discriminatory alternatives are available.[233] Wild animals after *Hughes*, like natural gas after *West v. Kansas Natural Gas Co.*,[234] would no longer be excluded by the Court from the commerce clause simply by virtue of a state's claim to ownership. Any regulation impeding their free trade in commerce would therefore be subject to commerce clause analysis.

By expressly overruling *Geer*, the Court precluded any argument that a state could restrict the flow in commerce of a natural resource found within its borders simply by virtue of its asserted claim of ownership. The impact of the decision would, therefore, extend beyond state regulation of wild animals. State authority to regulate any natural resource would be undermined where that authority is grounded in an asserted claim of ownership.

3. The Supreme Court's Analysis of State Ownership in *Sporhase*

The *Hughes* Court had reversed *Geer* because it viewed the concept of state ownership as a "19th century legal fiction."[235] Certainly, this holding was consistent with the Court's earlier decisions which cut back on the concept of state ownership.[236] In no case since *Geer*, however, had the Court fully examined what is implied by the concept of state ownership; why it is more of a

---

[230] The *Hughes* Court cited as the appropriate test those standards enunciated in West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), discussed *supra* at note 223, and the traditional balancing test stated by the Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See supra* text and notes at notes 46-51.

[231] 397 U.S. at 142.

[232] 141 U.S. at 336-37.

[233] *Id.* at 337.

[234] 221 U.S. 229 (1911). *See supra* note 190.

[235] 441 U.S. at 337.

[236] *See supra* note 224.

"legal fiction" than any other form of ownership;[237] or why the assumption that the state ownership theory is a "legal fiction" reduces a state's authority over that which it purports to own. Yet, without examining the meaning of state ownership or the reasons for its demise, the Supreme Court in *Sporhase* rejected the argument that the state ownership was sufficient to defend an embargo statute against a commerce clause challenge.[238] A closer look at the concept of state ownership is therefore necessary to evaluate the Court's analysis of the state ownership argument, and to determine whether a state ownership claim should remove water from the scope of the commerce clause.

Professor Frank Trelease, a noted commentator in the field, has observed that governmental conflicts over water cannot be resolved by reference to concepts of ownership.[239] According to professor Trelease, "[o]wnership is not a thing in itself, but a convenient word tool used to express a number of ideas . . . [I]t has no independent meaning aside from that which we put into it."[240] In sum, the term "ownership" is shorthand for the legal rights which one has over the thing owned, and in itself confers no authority.[241] One who claims ownership of a watch, for example, does not have the right to sell it, recover for its conversion, or donate it by gift or devise simply because one "owns" it—this is a tautology. Rather, the "owner" has these rights because he bought the watch (or it was given to him, he inherited it, etc.). His claim of ownership is shorthand for the various legal rights he has which flow from his purchase of the watch.[242]

The same analysis applies to state "ownership" of water. As stated by Professor Trelease:

> State ownership means that the state has power to control the allocation of water rights by permits, that the state may

---

[237] The most substantial reason given by a court since *Geer* why state ownership of natural resources is more of a "fiction" than other forms of ownership was that provided by the Court in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977). *See supra* note 224.

[238] Nebraska did not argue that solely because it claims ownership of its water, its embargo statute was exempt from commerce clause restrictions. The state did argue, however, that *Hudson County* was controlling. *Hudson County* relied on the concept of state ownership to reject the commerce clause challenge to the New Jersey embargo statute. *Hudson County*, 209 U.S. at 357.

[239] *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957).

[240] *Id.* at 639.

[241] *Id.*

[242] *Id.* at 638-39.

> adjudicate rights among appropriators, that it may take an active part in seeing that the water laws are obeyed, and that it may enact forfeiture laws. Why does it means this? Because we use the words to express the complex of these legal consequences of the fact that the state is the organization set up to regulate and control the allocation of scarce things among the people.[243]

Ownership, therefore, cannot be a starting point in determining what rights a state has over the water within its borders. The ownership analysis is particularly troublesome here because government ownership is not the same as private ownership.[244] The source of the authority and the rights which comprise right of "ownership" are different.[245]

Property concepts are therefore of little value in establishing the rights of individual landowners, states, and the federal government over water.[246] Rather, the appropriate question in determining whether the states or the federal government have authority over a particular source of water is not who owns the water, but which governmental body has the power to regulate that water, and whether the exercise of that power is appropriate.[247] In fact, the Court has in the past resolved disputes over water not by resorting to concerns of property and ownership, but by focusing on "the question of the allocation of sovereign power among the units of a federated government."[248]

Under this analysis, the *Sporhase* court was correct in rejecting the assertion by the state that a simple claim to ownership is in itself sufficient to remove water embargoes from the purview of the commerce clause. A claim of state ownership is meaningless without an analysis of the powers which lie behind the claim. In determining the constitutionality of the embargo statutes, the

---

[243] *Id.* at 648.

[244] *Id.* at 649-50.

[245] *Id.*

[246] *Id.* at 652.

[247] *Id.*

[248] *Id.* at 651 (citing United States v. Rio Grande Dam and Irrigations Company, 174 U.S. 690 (1899) (holding that the Federal government's power to protect the navigability of a river was superior to the states'); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (holding that the Desert Land Act granted control over water rights to the states, including water in public lands); Winters v. United States, 207 U.S. 564 (1908) (state power over water was held to be inadequate to limit the Federal government's treaty-making powers); FPC v. Oregon, 349 U.S. 435 (1955) (federal powers to build a power project were found to be superior to state powers to conserve fish)).

Court instead should examine the "allocation of sovereign power" between the states and the federal government. This approach is implicit in commerce clause analysis, and is precisely what the *Sporhase* court did in requiring the application of the second step of the commerce clause analysis, the burdens-to-benefits balancing test.

Unfortunately, the Court's analysis of the ownership issue stops short. The Court did not dismiss the relevance of Nebraska's claim of ground water ownership because it recognized the limited relevance of *any* claim to ownership. Failing to recognize that any claim of ownership *in itself* has limited significance, it dismissed the state's claim because it distinguished private ownership from state ownership, finding the latter to be a "legal fiction."[249] Yet, the Court reached the right result in refusing to determine the extent of Nebraska's right to regulate ground water based on its claim of ownership. The Court correctly decided that determining the proper roles of the states and the federal government in the commercial regulation of ground water can only be done by examining the sovereign powers of each and evaluating the extent to which regulation by each power is appropriate. However, the Court's cursory and unsatisfying treatment of state ownership as a "legal fiction" and therefore distinguishable from other forms of ownership may have resulted in its reaching an *incorrect* result in analyzing the second argument for exempting water embargoes from commerce clause analysis, that water is not an article of commerce.

B. Should Water Be Considered an Article of Commerce?

Nebraska argued that if state regulations prohibit the free intrastate trade of ground water, then the regulated water could not be considered an article of commerce.[250] In his dissent, Justice Rehnquist agreed, pointing out that in all prior cases in which the Court held that a state embargo violated the commerce clause, despite the state's ownership claim, the embargoed article was freely traded intrastate.[251] In those cases, therefore, the court had

---

[249] *See supra* text and notes at notes 126-29.

[250] Brief of Appellee, *supra* note 131, at 12-15.

[251] 458 U.S. at 963 (Rehnquist, J., dissenting) (citing Hughes v. Oklahoma, 441 U.S. 322 (1979) (minnows); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (natural gas); and West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (natural gas)).

no trouble in finding the embargoed article to be commerce.[252] In *Sporhase*, both the state[253] and the dissent[254] argued that Nebraska ground water, on the other hand, is not treated as an article of commerce for intrastate trade, so cannot be an article of commerce for interstate trade. The Court, however, rejected this argument solely because it was based on the "fiction" of state ownership, without further examining the merits of the claim that Nebraska ground water is not an article of commerce.[255]

Under Professor Trelease's analysis of state ownership, the Court's examination of Nebraska's argument that its ground water is not an article of commerce is inadequate. To describe state ownership as a legal fiction does not distinguish it from other types of ownership. Any form of "ownership" is a fiction in that it is a concept created to provide a convenient way to express a number of ideas regarding the "owners' " legal rights over the article "owned." To describe state ownership in particular as a "legal fiction" does not distinguish it from the individual's claim of ownership of real or personal property.[256] More importantly, the "not-in-commerce" argument does not even depend on a claim of state ownership. Independent of any ownership claim, a state may regulate the trade of a natural resource so that the resource lacks the necessary attributes of an article of commerce.[257] Rather than summarily dismissing the not-in-commerce argument as based on "the fiction of state ownership," the *Sporhase* Court should have examined the merits of the state's argument to determine if Nebraska ground water was somehow effectively diverted from the stream of commerce by the state. Even assum-

---

[252] *Id.*

[253] Brief of Appellee, *supra* note 131, at 12-15.

[254] 458 U.S. at 964-65 (Rehnquist, J., dissenting).

[255] 458 U.S. 950-51.

[256] This same analysis has been applied in criticizing the Supreme Court's state ownership analysis in Hughes v. Oklahoma, 441 U.S. 322 (1978). *See supra* text and notes at notes 227-34. In particular, it was argued that:

> [O]f course, all property ownership is a legal fiction, an elaborate system of socially sanctioned links between various fact situations and their consequences. So the [*Hughes*] Court's recognition that wild minnows have not yet been reduced to anyone's individual possession is, in itself, no explanation why a state should be forbidden to discriminate in access to them."

Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 96 (1980).

[257] The state's authority to regulate water use need not be based at all on state ownership, but arises out of the state's police powers independent of any ownership interest. Trelease, *supra* note 239, at 644.

ing that the concept of state ownership confers no power on the state, it is still necessary under the Court's analysis to first define "commerce," and then to apply that definition to Nebraska ground water.

The Supreme Court has held that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business,"[258] and that "commerce among the states is not a technical legal conception but a practical one . . . ."[259] In a very practical sense, the restricted exchange of Nebraska ground water does not occur in a manner consistent with the "normal and accepted course of business." On several occasions, the Court has stated that for profit exchange is a necessary element of an article of commerce.[260] Nebraska ground water may not be sold for profit, and may be transferred, either intrastate or interstate, only if it is in the public interest.[261] An argument can be made, independent of any claim to state ownership, that because Nebraska ground water may not be freely sold for profit,[262] that it is not an article of commerce.[263] The Court could have avoided this

---

[258] United States v. Yellow Cab Co., 332 U.S. 218, 231 (1947).

[259] Swift & Co. v. United States, 196 U.S. 375, 398 (1905). *See also* Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Minnesota v. Blasius, 290 U.S. 1 (1933).

[260] *See* Ziffrin v. Reeves, 308 U.S. 132 (1939) (holding that contraband cannot be an article of commerce); Young v. Kellex Corp., 82 F. Supp. 953 (E.D. Tenn. 1948) (holding that an atomic bomb, because it is not for sale, was not an article of commerce). Although in *Kellex Corp.* the district court was deciding the meaning of commerce within the Fair Labor Standards Act, it relied on the Supreme Court decision interpreting "commerce" for purposes of commerce clause analysis. The Court held that "commerce is passing of merchandise from one state to another, from one person to another, to be sold in competition with other goods in ordinary channels of trade." 82 F. Supp. at 958. "The atomic bomb is not a merchantable article in the sense that it is for sale." 82 F. Supp. at 959. "[T]rade and profit motives are discernible as inseparable from commerce." 82 F. Supp. at 960; Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) (holding that although it is a non-profit organization, the activities of the Associated Press constituted commerce because "[i]t was an instrumentality set up by constituent members who are engaged in a commercial business for profit." 301 U.S. at 128.

[261] *See* Brief of Appellee, *supra* note 131, at 12-15.

[262] The majority in *Sporhase* held that municipal water supply arrangements, by which water is sold from rural to urban municipalities, contradict the state's claim that water is not sold in commerce. 458 U.S. at 952-53. The Court further found that limiting the price which may be charged to the cost of distributing the water was simply price regulation, and did not remove the water sold from the definition of commerce. *Id.* It may be argued, however, that selling water for cost lacks the profit element which may be necessary for commerce, *see supra* note 260, and is consistent with the concept that the seller has only a usufructuary right to sell, not the water itself.

[263] *See*, however, In Re Rahrer, 140 U.S. 545 (1891), in which the Court stated:

complex and troubling issue entirely simply by finding that the Nebraska statute *affected* commerce. It did not have to find that the statute regulated an article of commerce to find that the statute was subject to commerce clause analysis. Under the Court's modern analysis of commerce clause issues, "commerce" is interpreted quite broadly.[264] It extends far beyond the interstate exchange of articles of commerce. The Court has adopted an economic approach to defining commerce, in which the Congress may regulate not only interstate commerce itself but all activities which have an economic effect on commerce.[265] The majority in *Sporhase* could have found that the restrictions on Nebraska ground water had a sufficient economic impact on interstate commerce to determine that the statute fell within the commerce clause without finding that the water itself is an article of commerce.[266] In this way, even if the Court had found that Nebraska ground water was not an article of commerce, it still would have been justified in reaching the second part of the commerce clause analysis, the balancing test. The Court, however, found Nebraska ground water to be an article of commerce, without addressing the real question posed by this issue. The Court therefore glossed

---

> [If] the State ha[s] the power to declare what should be a article of lawful commerce in the particular State . . . [then] it takes from Congress, and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated . . . . The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated . . . . For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police."

140 U.S. at 558-59 (quoting License Cases, 46 U.S. (5 How.) 504, 600-01 (1847)). *See also* Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978) (holding that "all objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.").

[264] *See generally* J. NOWAK, *supra* note 26, at 151-56.

[265] *See e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); U.S. v. Darby, 312 U.S. 100 (1941). The Court has rejected all mechanical tests previously used to determined what was "commerce" under the commerce clause, such as distinguishing subjects requiring uniform regulation from those subject of local concern (Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)); distinguishing production from transportation (United States v. E.C. Knight Co., 156 U.S. 1 (1895)); determining what fell within the "stream of commerce" (Swift & Co. v. United States, 196 U.S. 375 (1905)); and distinguishing activities having a direct versus an indirect effect on commerce (Hammer v. Dagenhart, 247 U.S. 251 (1918) (overruled by U.S. v. Darby, 312 U.S. 100 (1941), and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). *See generally* J. NOWAK, *supra* note 26, at 150-57.

[266] This was the position taken by the dissent. *See* 458 U.S. at 961-62 (Rehnquist, J., dissenting).

over a complex issue which it could have avoided entirely simply by finding that the Nebraska statute affected interstate commerce.

The Court's reliance on a "legal fiction" analysis of the not-in-commerce argument was inadequate. The Court failed to squarely address whether a state could regulate water in a manner that it is not an article of commerce. Nevertheless, because those regulations which merely affect commerce, even remotely, are within the scope of the commerce clause, the Court was correct in rejecting Nebraska's claim that its regulation of ground water exempted its embargo statute from commerce clause scrutiny. Ground water could not be distinguished from privately owned and freely traded articles for purpose of commerce clause analysis, because whether or not the water itself is an article of commerce, it clearly has an effect on commerce. Under the Court's expansion of the scope of the commerce clause to include all activities which merely affect commerce,[267] any water embargo statute would be subject to the strictures of the commerce clause.

The Court's expansion of the scope of the commerce clause affected state authority over water in other ways as well. This expansion also prohibits a state from arguing that the regulation of a commercial activity which is of extreme importance to the welfare of its citizens could be immune from commerce clause restrictions. Thus, under modern commerce clause analysis, the third argument for exempting water embargo statutes from commerce clause scrutiny—the police powers argument—must also fail.

C. The State Police Powers Argument

The *Sporhase* court upheld certain provisions of the Nebraska statute, in part because it found that a state's power to preserve limited water supplies to protect the health of its citizens to be "at the core of its police power."[268] Yet, the Court rejected the argument that because water is essential for human survival, the state's police power to regulate its use is so great that it precludes any federal interference through the commerce clause.[269] The police powers argument was earlier relied on by the Court in

---

[267] *See supra* text and note at note 158.

[268] 458 U.S. at 956.

[269] *Id.* at 952-53.

Hudson County Water Co. v. McCarter[270] in upholding the New Jersey embargo on the export of surface waters. Since *Hudson County*, the state's interest in preserving its water has vastly increased. The question remains, therefore, whether the *Sporhase* court could have gone further and held that because of water's unique nature, it falls completely within a state's police power, permitting a state in all instances to hoard water for its own citizens—or, whether commerce clause doctrine had so changed since *Hudson County* that despite the vital nature of water to the health of a state's citizens, it could only be regulated within the parameters of the commerce clause.

1. State Police Powers Over Natural Resources

In *Hudson County Water Co. v. McCarter*, the Court upheld the New Jersey water embargo statute against the commerce clause challenge by reference to the state ownership theory enunciated in *Geer*. While the Court referred to the state ownership argument, its decision was based primarily on a recognition of state police powers. Most of the Court's opinion addressed the "just compensation"[271] challenge to the statute. The Court rejected this claim not because of state ownership, but because of the exceptional police powers which the Court found were possessed by the states under *Geer*[272] to regulate water.[273]

Having found that the protection of its natural resources falls within the sovereign powers[274] of the state, the Court held that "few public interests are more obvious, indisputable, and inde-

---

[270] 209 U.S. 349 (1908).

[271] Under a just compensation claim, the property owner claims that the government has denied him the right to enjoy his property, in violation of the fourteenth and/or fifth amendments. *See e.g.*, Penn. Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The fifth amendment states, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

[272] *See supra* text and notes at notes 213-21.

[273] The *Hudson County* Court held that: "we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess." 209 U.S. at 355.

[274] A state's sovereign powers include those of the British Parliament, which vested in the American people at the time of the revolution. *See* Martz & Grazis, *Interstate Transfers of Water and Water Rights—The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33, 50-51 (1977) (citing Munn v. Illinois, 94 U.S. 133 (1877)). These powers include the police power to regulate in furtherance of health, safety, and welfare, the compact power to enter into agreements with other states, and the *parens patriae* power to protect the common interests of state citizens, in litigation and otherwise.

pendent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished. . . ."[275] The Court concluded that the private landowners' interest in water could not override the state's greater interest in preserving water for the general welfare.[276] The export embargo was, therefore, upheld under the theory that it was a proper exercise of the police powers of the state.[277]

A state's authority to preserve its vital natural resources under its police powers, however, was cut back substantially by the same line of cases which undermined the state ownership theory.[278] Most significantly, the Supreme Court held that natural resource export restriction would be upheld only if the state interest advanced by the statute is not economic, and if the statute does not unreasonably discriminate against non-residents. For example, in *Pennsylvania v. West Virginia*,[279] the Court struck down a West Virginia statute requiring that gas suppliers give its citizens preference in the distribution of natural gas. The Court rejected the State's asserted rationale of conservation, finding instead that the purpose of the Act was economic, and therefore not within the State's police powers.[280]

In *Douglas v. Seacoast Products Inc.*,[281] the Court struck down a statute which had a legitimate purpose, conservation, but which unreasonably discriminated against non-residents. In striking down a statute prohibiting non-residents from obtaining a fishing license, the Court held in this case that such statutes cannot place the burden of conservation entirely on non-residents. Valid conservation statutes must impose similar restrictions on resources used by residents as well.[282] The *Sporhase* decision is consistent

---

[275] 209 U.S. at 356.

[276] *Id.*

[277] *Id.*

[278] *See* Note, *supra* note 68, at 1273-75; *supra* text and notes at notes 222-34.

[279] 262 U.S. 553 (1923).

[280] *Id.* at 599.

[281] 431 U.S. 265 (1977).

[282] The Court found that:

> A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all. It bears repeating that a 'state may not use its admitted powers to protect the health and safety of its people as a basis for suppression competition' . . . . A State cannot escape this principle by cloaking objectionable legislation in the currently fashionable garb of environmental protection.

Id. at 285 n.21.

with the limits placed on state powers over natural resources by decisions such as *Pennsylvania v. West Virginia* and *Seacoast Products*. The Court found that restrictions on water exports could be justified if they actually promoted conservation, not just the commercial interests of the state, and only if intrastate trade was similarly restricted. Therefore, in one sense, the decision to permit water embargoes only in limited circumstances was proper, given the Court's earlier treatment of embargoes on fish, natural gas, and other resources.

In another way, however, this analysis is inadequate. Water is different from other natural resources, and had been treated differently by both Congress and the courts. An argument can be made that the Court should have recognized water's unique nature, and treated it differently under commerce clause analysis. The essential role that water plays in interstate commerce, however, clearly requires that its regulation be subjected to the restraints of the commerce clause.

2. Police Powers: Is Water a Unique Natural Resource?

Water is different from fish, natural gas, minnows and other resources whose regulation had been examined by the Supreme Court. Water is unique in that it is the only natural resource which a state and its citizens cannot exist without. Its supply is limited and cannot be readily controlled. In addition, unlike fish and natural gas, it is vital to both the economic and physical health of a state's citizens. While embargoes on water exports are clearly beneficial to the agriculture and industry of an arid state, they also serve to promote the health and welfare of its citizens.

The federal government has recognized that water is a unique commodity. The Supreme Court has observed that Congress has consistently deferred to the states in the regulation of water.[283] This deference was manifested in a number of ways: by congressional approval of interstate water compacts;[284] by continued congressional deference to state water law in enacting federal water project legislation;[285] and by the Supreme Court's recogni-

---

[283] California v. United States, 438 U.S. 645, 654 (1978).

[284] *See supra* note 146.

[285] The State noted that in 37 federal statutes affecting water rights, Congress required that the statute be implemented in accordance with the requirements of state water law. Brief of Appellee, *supra* note 131, at 22-25.

tion of a state's right to regulate the waters within its boundaries.[286]

A number of factors account for this deference. Undoubtedly, the primary reason is that water is as essential to the continued existence of a state as a sovereign entity as the land within its borders.[287] Without water, a state cannot survive, and without substantial continued supplies, the economic development of a Western state is impossible. Inasmuch as the very existence of a state is dependant upon its ability to maintain an adequate water supply, it can be argued, its regulation should not be subject to the same commerce clause scrutiny as the regulation of fish and natural gas. A state should be permitted, according to the analysis, to hoard water for its own citizens. It should not have to sacrifice its own existence for its neighbor.

As was found by the majority in *Sporhase*, however, a holding that state regulation of water would never violate the commerce clause would require a corresponding finding that Congress may not regulate water in a manner inconsistent with state law.[288] Although water is clearly essential to the health and welfare of a state's citizens, and is thus within a state's police powers, it also plays a vital role in interstate commerce. The *Sporhase* majority noted that over eighty percent of U.S. water supplies are used in agriculture, and that worldwide agriculture markets represent the prototypical commercial activity which the framers believed should be subject to federal regulation.[289] In addition, the Court held that the multistate nature of the Ogallala Aquifer—the body of water underlying appellant's land, which extends from Colorado and Nebraska to Texas, New Mexico, Oklahoma and Kansas—underscores the significant federal interest in the con-

---

[286] *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); California v. United States, 438 U.S. 645 (1978).

[287] *See* West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). "The regulation of the use and disposal of . . . waters . . . if it be within the power of the State, is among the most important objects of government." 221 U.S. at 258 (quoting the state court opinion in Hudson County Water Co. v. McCarter, 70 N.J. Eq. 695, 701 (1906). *See also* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); State ex rel. Corwin v. Indiana and Ohio Oil, Gas & Mining Co., 120 Ind. 575, 22 N.E. 778 (1889); Comment, *"It's Our Water!"—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER REVIEW 118, 124-28 (1975).

[288] 458 U.S. at 953-54. But see the dissent of Justice Rehnquist, in which he finds that, "the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the commerce clause . . . ." 458 U.S. at 962-63 (Rehnquist, J., dissenting).

[289] 458 U.S. at 953.

servation and fair allocation of water.[290] Given that there are aspects of water regulation which clearly affect interstate commerce, it would be improper to prohibit federal regulation entirely.

That water should be subject to national regulation also seems consistent with the purpose of the commerce clause. In particular, a state embargo on water to preserve the resource solely for its own citizens can be viewed as the very sort of evil which the commerce clause was designed to prevent. The Supreme Court has consistently interpreted the commerce clause as arising from "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the states . . . ."[291] A determination that no state or states should be able to become "the OPEC of the the midwest"[292] is certainly consistent with the idea that "the peoples of the several states must sink or swim together . . . ."[293]

Finally, the Supreme Court has expressly rejected the idea that solely because a state regulation has a legitimate health, safety or

---

[290] *Id.*

[291] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). See also Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), finding that "[t]he [commerce] clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution ." 426 U.S. at 807; H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949), which held that:

> Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. 539.

It should be noted, however, that such was not the unanimous view of the framers. The failure of the commerce clause to mention a limitation on state powers may have resulted from a division between the delegates at the Constitutional Convention who favored a strong central government, and those who believed that state sovereignty must be the backbone of the new union. Concerned more with coming to agreement on the general issues, the Convention may have deliberately left unsettled the extent of state authority over commerce. *See* Browde & Dumars, *State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier*, 60 OR. L. REV. 7, 12-13 (1981).

[292] This may be exactly what the governors of several midwestern states have in mind for the Great Lakes. *See generally* Golden, *supra* note 1.

[293] Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935).

welfare objective, the Court should turn its head from the regulation's burden on interstate commerce. In *Baldwin v. G.A.F. Seelig*,[294] the Court noted that a health, safety, or welfare objective can be found in *all* regulations. Therefore, treating purported health, safety, or welfare regulations differently "would be to eat up the rule under the guise of an exception .... [T]o give entrance to that excuse would be to invite a speedy end of our national solidarity."[295] The *Sporhase* Court was, therefore, correct in rejecting the argument that the importance of water to the health and welfare of a state's citizens justifies all restrictions on its export, regardless of the burden on interstate commerce. Since the Court accepted this argument in *Hudson County*, state authority over the natural resources within its borders has been narrowed, while the scope of activities which fall within the purview of the commerce clause has been expanded. Given the vital role which water plays in our national economy, it would have been inconsistent with the Court's modern view of commerce, as well as the framer's view of the role of the commerce clause in promoting a unified national economy, for the Court to hold that the hoarding of water by an individual state could not under any circumstance violate the commerce clause.

In its role as regulator of water use, therefore, a state must be subjected to constitutional scrutiny. If the state were acting in another capacity, however—as a market participant, for example, not a regulator—its actions might fall outside the purview of the commerce clause. This fourth argument for exempting water embargo statutes from the scope of the commerce clause—the state as market participant exception—will now be examined.

D. The State as Market Participant

When a state itself acts as a participant in the marketplace, and not simply as a regulator of other market participants, it may discriminate against non-citizens without violating the commerce clause.[296] In listing the reasons that a state may grant a limited preference to its own citizens in the allocation of a limited water supply, the *Sporhase* Court noted that "water has some indicia of a good publicly produced and owned," citing their earlier decision

---

[294] *Id.*

[295] *Id.*

[296] Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

in *Reeves, Inc. v. Stake*.[297] The Court considered this "indicia" of market participation to be only a factor that weighed in favor of permitting a limited preference; it did not find it sufficient to remove water from the scope of the commerce clause.

In *Hughes v. Alexandria Scrap Corp.*,[298] the Court carved out the state as market participant exception to the commerce clause. The Court found that in purchasing automobile hulks to encourage recycling, Maryland could require extensive documentation evidencing ownership from non-residents, but not residents, without violating the commerce clause. The Court found that "[n]othing in the purposes animating the commerce clause prohibits a State, in the absence of congressional action, from participating in the marketing and exercising the right to favor its own citizens over others."[299] The Court, therefore, distinguished such activities from regulations impeding interstate commerce.[300]

In *Reeves, Inc. v. Stake*,[301] the Court again relied on the market participant concept in finding that South Dakota could limit the sale of cement produced by a state owned and operated cement plant to state citizens, when faced with a cement shortage. The majority found that the commerce clause encompasses only state taxes and regulatory activities which burden interstate commerce. It was not intended to prevent a state from acting freely in the marketplace.[302] The Court also determined that "[r]estraint in this area is . . . counseled by considerations of state sovereignty, the role of each state as guardian and trustee for its people."[303]

An argument could be made that Nebraska controlled the distribution of water not as a market regulator, but rather as a market participant. The Court in *Reeves* upheld South Dakota's right to sell cement solely to its own citizens by finding that the existence of the cement could be attributed to the efforts of the state itself.[304] The Court found, therefore, that like providing fire and police protection only to its own citizens, it was not protectionism for the state to sell its cement only to South Dakota

---

[297] 447 U.S. 429 (1980), *cited in Sporhase*, 458 U.S. at 957.
[298] 426 U.S. 794 (1976).
[299] *Id.* at 810.
[300] *Id.* at 806.
[301] 447 U.S. 429 (1980).
[302] *Id.* at 436-37.
[303] *Id.* at 438.
[304] *Id.* at 442.

citizens.[305] Similarly, as the *Sporhase* Court held, Nebraska ground water is like South Dakota cement in that its supply resulted directly from the efforts and sacrifices of the state through its conservation plan.[306] In addition, as conceded by the *Sporhase* majority, Nebraska does have *some* claim to ownership of its water.[307] Thus, as the Court found, Nebraska ground water has some qualities of a publicly owned and produced good.[308] The Nebraska statute, therefore, can be viewed not as a state regulating the activities of private parties in the marketplace, but as a state determining the circumstances under which it will distribute its own resource. As a market participant, not a market regulator, a state's prohibition of water exports would be protected by the market participant exception.

The Court's decision in *Reeves*, however, precludes such an argument. Unlike the state activities upheld in both *Hughes* and *Reeves*, Nebraska's activity did not actually constitute entering the marketplace itself. Nebraska was not actually selling water, but regulating the sale of water by others.

In addition, three factors which the *Reeves* Court found necessary to uphold the South Dakota statute are missing from the facts brought before the *Sporhase* Court.[309] First, the *Reeves* Court relied on the fact that South Dakota was giving preference to its own citizens in the distribution of a resource owned by the state and paid for by state revenues.[310] Even if one accepts the concept of state ownership of water,[311] Nebraska water is distinguishable from South Dakota cement in that it is not a benefit paid for by state revenues.

Second, the Court upheld the South Dakota statute because it did not constitute a ban on the export of a natural resource. Rather, the statute limited the export of a manufactured product, derived from natural resources.[312] This distinguished the South Dakota statute from those limiting access to minnows,[313] landfill

---

[305] *Id.*
[306] 458 U.S. at 957.
[307] *Id.* at 956.
[308] *Id.* at 956-57.
[309] *See* Note, *supra* note 68, at 1267-70.
[310] 447 U.S. at 442.
[311] *See supra* text and notes at notes 210-49.
[312] 447 U.S. at 444.
[313] Hughes v. Oklahoma, 441 U.S. 322 (1979).

sites,[314] and natural gas,[315] which had previously been struck down by the Court. In *Sporhase*, however, the export of a natural resource, Nebraska ground water, was expressly limited and could not be distinguished under this test.

Third, the *Reeves* Court held that the South Dakota statute could not have been upheld if it had barred the resale of its cement by its customers to non-residents or prevented others from selling cement to non-residents. This would have constituted hoarding, which violates the commerce clause.[316] Water anti-exportation statutes, however, do ban the use of the resource altogether, and thus could not be upheld under this requirement of the *Reeves* decision.

Nebraska's regulation of ground water does have some attributes of market participation. Given that it also constitutes regulation which violates the principles enunciated in *Reeves*, however, the *Sporhase* Court could not have found the Nebraska statute to be exempt from commerce clause restrictions under the market participant exception.[317]

The market participation exception was created, in part, in deference to the sovereign role of the state as protector of its citizens.[318] The concept of sovereignty appears periodically throughout the debate over state control of water.[319] Vague notions that federal regulation of individual water rights somehow encroaches on the state's separate and independent existence, while appealing, play a limited role in the actual distribution of powers between the federal government and the states. Aside from its implicit role in commerce clause analysis, the concept of

---

[314] Philadelphia v. New Jersey , 437 U.S. 617 (1978).

[315] Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[316] 447 U.S. at 444.

[317] *See also* Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-owned Resources*, 59 TEX. L. REV. 71, 92 (1980), in which the authors argue that the *Reeves* market participation exception should be limited to restrictions on the initial disposition of a resource, and to "truly" state-owned resources. It should not be applied to subsequent dispositions by the initial purchaser, or to property which the state "owns" but does not actually possess—such as ground water under private land.

[318] 447 U.S. at 438.

[319] For example, in his dissenting opinion in *Sporhase*, Justice Rehnquist observed that the preservation of natural resources and water in particular has been recognized to be the sole responsibility of the state in its sovereign capacity. 458 U.S. at 963 (Rehnquist, J., dissenting) (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Kansas v. Colorado, 185 U.S. 125, 142, 145-46 (1902)). *See supra* note 161.

state sovereignty serves to limit federal commerce powers solely through the tenth amendment. The limited restraints imposed on the federal commerce power by the tenth amendment are inadequate to remove state water use regulations from the scope of the commerce clause.

E. The State Sovereignty Argument

State authority over water and water rights arises from the state's general sovereign powers, through either the police powers, compact powers, or the right of *parens patriae* to represent citizens of the state to protect their interests.[320] A state's sovereign powers however, are limited by federal powers, including the authority of the Congress to regulate commerce.[321] Therefore, a claim that regulation of water is within a state's sovereign authority does not automatically negate federal controls over water and water rights.[322] Rather, the state sovereign power will be balanced against the federal interest in the disputed area.[323] Any argument that the federal regulation of water use is inappropriate because water is integral to state sovereignty would have to be based on some specific limitation on the federal commerce clause powers.

The tenth amendment is such a limitation.[324] Once viewed by the Supreme Court as constitutional window dressing, placing no specific limitation on the commerce powers of the Congress,[325] the Court now views the tenth amendment as a specific check on federal regulations which impair the sovereignty of the individual

---

[320] A state's sovereign powers encompass those of the British Parliament, which vested in the people at the time of the revolution. These powers include the police power to regulate in furtherance of health, safety and welfare, the compact power to enter into agreement with other states, and the *parens patriae* power to protect the common interests of state citizens, in litigation and otherwise. *See supra* note 274.

[321] Martz & Grazis, *supra* note 274, at 50.

[322] *See generally*, Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).

[323] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *supra* text and notes at notes 40-46.

[324] The tenth amendment reads in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *See* J. NOWAK, *supra* note 26, at 159-63.

[325] Between 1936 and 1979, the Court consistently rejected arguments that the tenth amendment prohibited Congress from regulating an activity affecting the operations of the individual states. *See* J. NOWAK, *supra* note 26, at 159-60.

states.[326] In *National League of Cities v. Usery*,[327] the Court struck down as violative of the tenth amendment the application of minimum wage and overtime provisions of the Fair Labor Standards Act to state employees. The majority held that "[w]e have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress lacks an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[328]

The authority of a state to take action to ensure a continued supply of water has long been recognized as integral to state sovereignty.[329] It could even be argued that water is essential to the very existence of a state as a sovereign political entity. Take away a state's water and it exists only as an abstract concept of sovereign powers. These powers would be no more abstract than if a state's land was taken away. It could certainly be argued that water deserves at least the same degree of deference to state authority as employee salaries, and that the tenth amendment

---

[326] Note, however, that since its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court has exhibited reluctance to invoke the tenth amendment to prohibit federal regulation of state activities. In all four tenth amendment cases considered by the Court since *Usery*, the Court has upheld the federal regulation. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264 (1981) (discussed *infra*, text and notes at notes 311-12); United Transp. Union v. L.I.R.R., 455 U.S. 678 (1982) (holding that application of the Railway Labor Act to a state-owned railroad does not violate the tenth amendment); FERC v. Mississippi, 102 S. Ct. 2126 (1982) (the Court upheld provisions of the Public Utility Regulation Policies Act against a tenth amendment challenge); EEOC v. Wyoming, 51 U.S.L.W. 4219 (March 2, 1983) (which held that application of the Age Discrimination in Employment Act to Wyoming game wardens did not violate the tenth amendment). *EEOC v. Wyoming*, in particular, leaves in doubt the vitality of the tenth amendment. Although the Supreme Court distinguished *Usery*, both cases involve a similar application of labor regulations to state employees, and the successful application of *Usery* in the near future may be unlikely. Recently, however, the Court indicated that it was prepared to re-think entirely its interpretation of the tenth amendment. Following initial oral arguments in Donovan v. San Antonio Metropolitan Transit Authority, the Court ordered the parties to make new arguments, indicating that *Usery* and its progeny may be abandoned, and a new approach to defining state sovereignty under the tenth amendment may be adopted. *See* Donovan v. San Antonio Metropolitan Transit Authority, Lab. Cas. (CCH) (W.D. Tex. Nov. 17, 1981), *cert. granted*, 52 U.S.L.W. 3937 (U.S. July 5, 1984) (No. 82-1951); *States Rights: A Landmark Decision is in the Making*, BUSINESS WEEK, Sept. 24, 1984, at 130.

[327] 422 U.S. 833 (1976).

[328] *Id.* at 845.

[329] *See e.g.*, Hudson County Water Co. v. McCarter, 209 U.S. 349, 355-56 (1908).

therefore, leaves to the states sole authority over the water within its borders.[330]

The Court's decision in *Usery*, and it's subsequent decision in *Hodel v. Virginia Surface Mining and Reclamation Association*,[331] however, precludes such an argument. In *Virginia Surface Mining* the Court upheld provisions of the Surface Mining Control and Reclamation Act against a tenth amendment challenge. The Court determined that, as outlined in its earlier decision in *Usery*,[332] federal regulations will not be found to violate the tenth amendment unless three requirements are met: 1) the statute must regulate the "states as states;" 2) the regulation must address matters that are "attributes of state sovereignty;" and 3) there must be a showing that state compliance with the statute would directly impair their ability "to structure integral operations in areas of traditional functions."[333]

Even assuming that federal regulation of water use meets the latter two elements of the test, it is clear that a statute dictating how water is to be used would not be regulating "states as states." In discussing this requirement, the *Virginia Surface Mining* Court distinguished the regulation of private individuals, who are necessarily subject to both federal and state regulation, from

---

[330] Even if the regulation of water rights is an activity reserved to the states by the tenth amendment, such that Congress could not regulate it, it is not clear that the states could regulate water in whatever manner they desire, despite the burden on commerce. In all cases in which the tenth amendment was held to reserve the regulation of a particular activity to the states, the Court was considering the validity of an affirmative act of Congress, not the validity of state action. *See e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935); National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down the minimum wage and overtime pay provisions of the Fair Labor Standards Act as applied to state employees).

Nevertheless, if an activity left to the states by the tenth amendment must be regulated so as not to burden interstate commerce, certain activities would fall through a constitutional crack, incapable of being regulated by the Congress or the states. Such a scheme makes little sense in our federalist system. The Supreme Court may have indicated agreement with the concept that the regulation of activities reserved to the states by the tenth amendment is not limited by the dormant commerce powers of the Congress. In discussing the market participation exception to commerce clause limits on state regulation, the *Reeves* court held that "considerations of sovereignty independently dicate that marketplace actions involving 'integral operations in areas of traditional governmental functions' . . . may not be subject even to congressional regulation pursuant to the commerce power." 447 U.S. at 429, 438 n.10. It follows easily that the intrinsic limits of the commerce clause do not prohibit state marketplace conduct that falls within this sphere.

[331] 452 U.S. 264 (1981).

[332] 426 U.S. 833 (1976).

[333] 452 U.S. at 287-88.

federal regulation of the "states as states."[334] The tenth amendment does not prohibit federal regulation of the activities of private persons and corporations.[335] Thus, federal statutes regulating the actions of private individuals, and not the operations of the states themselves, do not constitute a tenth amendment violation.[336] A federal statute dictating when an individual could or could not export water, or even legislation regulating the individual's use of water, would, therefore, be upheld under the Court's decision in *Virginia Surface Mining* as the regulation of private individuals, not "states as states." The tenth amendment is thus unavailable to protect state authority over water from the scope of the commerce clause.[337]

F. Is Water Different? Summary

The *Sporhase* Court was correct in finding that there are no specific exceptions available to remove the Nebraska water embargo statute from the purview of the commerce clause. None of the potential arguments—state ownership, water is not an article of commerce, police powers, market participation, and state sovereignty—could successfully have been advanced by Nebraska in support of the proposition that federal regulation of water use is not provided for by the Constitution.

In addition, an analysis of the above arguments indicates that given the current broad scope of the federal commerce power, and the concurrent demise of the state ownership doctrine and state police powers over natural resources, a successful constitutional challenge to any federal regulation of water rights is unlikely. More significantly, any state regulation of water rights could be struck down as a violation of the commerce clause, if it can be established that the statute's burden on interstate commerce outweighs its local benefits. In short, water can no longer be distinguished from other natural resources as something so vital to

---

[334] *Id.* at 286.

[335] *Id.*

[336] *Id.*

[337] The Ninth Circuit has agreed that the tenth amendment does not prohibit Congress from regulating state waters, even if the state claims ownership of the waters. *See* State of Minnesota by Alexander v. Block, 660 F.2d 1240, 1252 (9th Cir. 1981) (upholding the constitutionality of federal statutes regulating the use of motorboats on state waters).

the existence of a state that it falls outside the purview of the commerce clause.

The Supreme Court was on solid ground in finding that state regulation of water rights should be subjected to commerce clause scrutiny. Yet, the Court's analysis in reaching that conclusion, and the manner in which it then balanced the competing federal and state interests in Nebraska ground water under traditional commerce clause analysis, raises unsettling questions. In particular, the *Sporhase* decision raises questions as to whether both water policy and commerce clause doctrine would have been better served by judicial deference to congressional authority in this area.

VI. Reconciling Competing State and Federal Interests in Water

Any challenge to the constitutionality of a state statute poses difficult problems which can only be resolved by balancing the complex, competing federal and state interests in the regulated area. While the Court is often called upon to resolve these problems through commerce clause analysis, such issues might arguably be better settled by the Congress in some instances. Even though the *Sporhase* Court clearly had the authority and judicial tools necessary to resolve these questions, their resolution by the Congress rather than the Court might have been more appropriate from both a policy and constitutional perspective.

This section will first establish the judicial validity of the Court's decision in *Sporhase*. It will be shown that the way in which the Court balanced the competing federal and state interests in Nebraska ground water was consistent with traditional commerce clause analysis. It will also briefly examine the degree to which the outcome of the Court's balancing test was consistent with federal water policy. Next, this section will argue that while consistent with traditional commerce clause analysis and federal policy, the manner in which the Court applied the commerce clause balancing test in *Sporhase* reveals that traditional commerce clause analysis is too blunt an instrument with which to parcel out the delicate and competing federal state interests in water. Finally, this section will conclude that the Court could have recognized its limited capacity to resolve such disputes, and left the issue of water rights to be regulated by the Congress.

A. Balancing State and Federal Interests under the Commerce Clause

Having correctly decided that there were no specific exceptions which protect state water embargoes from commerce clause scrutiny, the manner in which the *Sporhase* Court balanced the state and local interests in water was consistent not only with well established commerce clause principles, but also with the Court's past approach to water issues, and with federal water policy as well. Although the result reached by the *Sporhase* Court was therefore proper, employing traditional commerce clause analysis is not necessarily the best way to balance these competing interests. Ultimately, both water policy and commerce clause doctrine may have been better served if the Court had deferred to the Congress to judge the propriety of the Nebraska statute.

1. The Court's Holding Was Consistent with Traditional Commerce Clause Analysis and National Water Policy.

The Court was correct in finding that there was no available exception which would have entirely removed state regulation of water rights from the scope of the commerce clause. Having reached the second stage of its commerce clause analysis, the result reached by the Court was also consistent with prior decisions in which it balanced the state interest in the regulated subject against the federal interest in interstate commerce. In this sense the Court's decision is supportable and well founded.

The Court's finding that water embargoes may be constitutional if, and only if, the restrictions are strongly tied to needed conservation policies is consistent with the Court's general approach to restricting state police powers under the dormant commerce powers of the Congress. The more a statute looks like economic protectionism, the more likely that the statute will be struck down. The more it appears to reflect a legitimate concern for the health, safety, and welfare of its citizens, and not an attempt to improve the economic position of residents to the detriment of non-residents, the more likely it will be upheld.[338] It is therefore consistent with this approach to find that export restrictions will be upheld if intrastate use is similarly limited, and that outright bans may be upheld if the state is demonstrably

---

[338] *See supra* text and note at note 145.

arid, and the statute is closely tied to state efforts to cope with its water shortage.

In addition, the result reached by the Court in granting great deference to the states to regulate water use and to restrict exports is consistent with the Court's own prior recognition of the wisdom of granting states significant authority to regulate the use of water within their borders.[339] Under the Court's balancing test, the Court correctly gave considerable weight to a state's extraordinary interest in preserving the water within its boundaries.

It is also noteworthy that continued deference to state water law is consistent with what may appropriately be called the national water non-policy.[340] There has been little if any movement in the federal government or the states away from the traditional view that water is properly a local concern, and that the states should have primary control over the water within their borders.[341] Given the level of Western interest in water, it is fair to say that the Court's decision also comported with political realities.[342]

2. The Applicability of Traditional Commerce Clause Analysis to State Regulation of Water

The Court's finding that states should be given considerable deference in restricting water exports, so long as the regulation is reasonably tied to the legitimate goal of conservation, is consistent with the principles the Court has laid down for balancing state police interests against federal commerce interests. It was also consistent with earlier decisions in which the Court has held that the states should be granted considerable deference in regulating water. The Court was also correct in finding that there was no specific exception available to remove water regulation from the purview of the commerce clause. Nevertheless, the Court's application of traditional commerce clause analysis to the Nebraska statute raises problems which indicate that the Supreme Court may not be the proper forum in which to resolve the complex issues posed by state regulations of water which burden interstate commerce. At the very least, the Court's decision indi-

---

[339] *See supra* text and notes at notes 283-86.

[340] *See supra* text and notes at notes 13-14, 204-06.

[341] *See supra* text and notes at notes 204-06.

[342] *See supra* text and notes at notes 1-55, 204-08.

cates that traditional commerce clause analysis is a clumsy tool with which to balance competing state and federal interests over water.

The Court has consistently struck down all embargoes on exports of natural resources as violative of the purpose of the commerce clause.[343] The Court has continually held that the commerce clause was designed to insure a unified economy; that no one state can work as a separate economic unit to the detriment of the whole.[344] With regard to the imposition of embargoes on the export of natural resources in particular, the Court has held that:

> If the States have such a power a singular situation might result. Pennsylvania might keep its coal, the northwest its timber, the mining States their minerals, and why not the products of the field be brought within the principle? . . . .To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.[345]

Yet the Court found that water embargoes are sometimes permissible. The state's extraordinary interest in its water justifies this result under a traditional commerce clause analysis. The question remains, however, whether a traditional commerce clause analysis is the appropriate tool with which to balance federal and state interests over water. Having decided to apply such analysis at all, the now-expansive scope of the commerce clause forced the Court to treat the Nebraska statute as burdening commerce. Yet, the state's interest in water also forced the Court to uphold state regulation of water in a manner inconsistent with the purpose of the commerce clause, as earlier determined by the Court.[346] By finding that even an absolute water embargo may not violate the commerce clause in certain cases, the *Sporhase* decision is not consistent with the Court's earlier decisions holding that the commerce clause permits no embargoes on natural resources. Presumably, the judicial justification for permitting absolute water embargoes in times of severe shortage is that the interests being protected are health and safety, not

---

[343] *See supra* text and notes at notes 56-60.

[344] *See supra* text and notes at notes 285-93.

[345] West v. Kansas National Gas Co., 221 U.S. 229, 255 (1911).

[346] The Court did strike down the reciprocity provision of the Nebraska statute. Most of the Court's opinion, however, indicates a deference to the states over the regulation of water rights which it has not recently granted with regard to any other "article of commerce."

commerce. The spectre of federal courts, examining water supply data and state plans for use of its water to determine if the drought is sufficiently severe and to ensure that the water will not be used to benefit the local economy, highlights the folly of attempting to make such a distinction. It is for this reason that the Court had earlier wisely held that to permit this distinction "would be to eat up the rule under the guise of an exception" and "would be to invite a speedy end to our national solidarity."[347]

The problem is exacerbated by the fact that given the interstate dimension of water sources such as the Ogallala Aquifier,[348] it is likely that if one state is suffering from a severe water shortage, other states may be as well. Thus, since both interests increase or decrease proportionally, a balancing of the state interests in water conservation against the federal interest in preventing significant burdens on the free flow of interstate commerce becomes a futile exercise.

This situation can also be cast in terms of constituting a problem in defining the federal interest being advanced by the Court's invocation of Congress' dormant commerce powers. The automatic assumption on the part of the Court that federal interests are always on the side of free trade between the states is questionable with regard to commerce generally.[349] When the article being traded is limited natural resources, however, the federal interest is even less clear.[350] With regard to water in particular, it is clearly not certain that it is in the national interest in all cases to permit the free transfer of water across great distances to arid areas.[351] Yet, a traditional commerce clause analysis requires this assumption. At the very least, there are complex policy issues involved in how dwindling water resources should be used, and it is not clear that the national interest always falls on the side of the free transfer of water across state lines.[352]

---

[347] Baldwin v. G.A.F. Seelig , 294 U.S. 511, 523 (1935).

[348] *See supra* note 132.

[349] *See* Note, *Hughes v. Oklahoma and Baldwin v. Fish and Game Commission: The Commerce Clause and State Control of Natural Resources*, 66 VA. L. REV. 1145, 1163 (1980).

[350] *Id.*

[351] *See generally* Sheets, *Crisis*, *supra* note 1.

[352] *Id.* The debate over the proposed coal slurry pipeline for example, which would further strain limited water supplies in order to transport coal, raises such water policy issues. *See generally* Martz & Grazis, *supra* note 274.

B. The Court Could Have Deferred to Congress

It would not have been without precedent had the Court decided in this case that the issues raised were better handled by the Congress than under traditional commerce clause analysis. In a very similar situation, the Supreme Court has recognized the difficulty of applying traditional commerce clause analysis, and left the statute to be struck down by the Congress, if it so chose. With regard to market participation by state-owned industries,[353] the Court held in *Reeves v. Stake*[354] that the commerce clause was not applicable, not because there was no federal commerce interest being affected,[355] but because commerce clause analysis was held to be a clumsy tool with which to sort out federal and state interests. In *Reeves*, the Court held that, "[t]he competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional commerce clause analysis. Given these factors, the adjustment of interests in this context is a task better suited for Congress than this Court."[356] As discussed above, Nebraska regulation of ground water does not constitute state participation in the marketplace, so does not fit within the *Reeves* exception. Yet, just as the states' claim to ownership of its water can be looked at as no more than legal shorthand for its great interest in the water, a state's "proprietary actions" with regard to a state owned business is also legal shorthand for its strong interest in that business, particularly given the meaninglessness of the distinction between "actual ownership" in title and state ownership of its natural resource, for purposes of constitutional analysis.[357] In both cases, water and state-manufactured cement, it is the state's extraordinary interest in that which is being regulated which justifies discrimination against non-residents. It is also this same extraordinary interest which gives rise to the "subtle, complex, politically charged," competing considerations which makes this regulation difficult to assess under traditional commerce clause analysis.[358]

---

[353] *See supra* text and notes at notes 296-319.

[354] 447 U.S. 429 (1980).

[355] The *Reeves* Court held that the commerce clause did not reach state market participation, 447 U.S. at 436-37; however, it did not say that the state's actions did not burden commerce.

[356] 447 U.S. at 439.

[357] *Cf.* Anson & Schenkkan, *supra* note 256, at 96.

[358] With regard to a related area of water law, Professor Charles E. Corker, a noted

The Court's decision reveals the difficulty of balancing federal against state interests in water under a traditional commerce clause analysis—whether commerce exists in the water at all is questionable, and more importantly, the state's extraordinary interest in the water tips the scales in favor of the state to such a degree that the federal commerce interest is lost. Although significant federal deference is justified by the state's interest in the water, it clearly conflicts with the purposes of the commerce clause. At the very least, Nebraska's great interest in its ground water, like South Dakota's great interest in its cement, makes traditional commerce clause analysis difficult. Further, a mechanical commerce clause analysis is inadequate for the difficult task of balancing the "subtle, complex, [and] politically charged" issues inherent in the resolution of water disputes. As it did with state market participation, therefore, the Court might have found that the balancing of a state's interest in its water against the federal commerce interest would be better handled by Congress.

Had the Court done so, it would of course have been up to the Congress to determine the extent to which states can restrict the flow of water in interstate commerce.[359] Until it chose to exercise its authority in this area, the Nebraska statute would have survived. It is unlikely that Congress would seriously consider usurping state authority over water rights in the near future.[360] State

---

commentator in the field, has observed that the resolution of water disputes may be better handled by Congress than the Supreme Court. In discussing the imposition of equitable apportionment decrees by the Supreme Court to resolve interstate water, Professor Corker observed that "exercise of the original jurisdiction in interstate water disputes is a burdensome function to the Supreme Court and one which Congress, because of the technical resources available to it, is better equipped to perform than the Supreme Court." 2 WATERS AND WATER RIGHTS 326 (R. Clark ed. 1967). Although the balancing of state and federal water interests does not require the technical expertise necessary to allocate the water of an interstate stream between two states under an equitable apportionment decree, decisions in both areas raise complex issues of water policy and water rights which may better be handled by Congress.

[359] It may be worth noting that in either case, the question is not who will make this determination—Congress or the Court—but the way in which Congress' authority in this area will be exercised. In striking down a state statute as violative of the commerce clause, the Court is, of course, recognizing Congress' dormant powers to regulate where the state had regulated. It is, in essence, making a judicial determination that if Congress had wanted to regulate in such a way, it would have done so. Further, Congress always has the authority to approve the state regulation after it has been struck by the Court, just as if they decided to regulate in this area absent judicial interference. *See generally* J. NOWAK, *supra* note 26, at 250-52. In this sense, the question is not whether state regulation in this area will be policed by the Congress, but how Congress will or will not exercise its authority.

[360] *See supra* text and notes at notes 203-08.

water embargo statutes would therefore remain in force, at least for now. Yet, should the worst fears of the experts materialize—and water does become the "crisis of the 80's"—Congress might be forced to impose national regulations on water use. If so, the short-term impact of the *Sporhase* decision on state water policies would be negated. One effect of the decision would remain, however: the unnecessary and unfortunate distortion of commerce clause doctrine.

VII. CONCLUSION

Although the actual effect of the *Sporhase* decision on state water embargo statutes may be fairly limited, the Supreme Court has taken a significant step in finding that water is not a unique resource, subject to exclusive control by the states. No longer can a state claim that the water within its borders belongs to the citizens of the state, for their use only. Since water is now an article of commerce, the citizens of every state have an interest in all of the waters, and this interest will be protected by the federal courts through the commerce clause.

The finding by the Supreme Court that water is an article of commerce is justified under a traditional commerce clause analysis—it clearly has a substantial impact on interstate commerce, and there are no available exceptions which would totally remove water from the scope of the commerce clause. In addition, in balancing the state and federal interests in water, the Court reached an appropriate result in leaving the states considerable authority to restrict water exports to achieve conservation goals and even to protect the interests of their own citizens.

It is precisely this deference to the states under a commerce clause analysis, however, which makes the *Sporhase* decision unsettling. The decision raises questions as to the applicability of a traditional commerce clause analysis to activities such as the regulation of water rights in which the state has an exceptional interest. A mechanical dormant commerce clause analysis which assumes that the federal interest always falls on the side of an unrestrained exchange of any articles which have an impact on interstate commerce may not be appropriate to all natural resources. The analysis may be particularly inapplicable to water resources, which lack some of the commercial elements which define an article of commerce, and in which the state has an extraordinary interest. Further, subjecting water rights statutes

to commerce clause scrutiny forces the Court to apply a simple and rigid balancing test to resolve the conflict between state and federal interests which are "subtle, complex, politically charged, and difficult to assess under traditional commerce clause analysis."[361] The Supreme Court could have deferred to the Congress, finding that the competing federal and state interests in this area are too difficult to sort out and weigh under a traditional commerce clause analysis, and that this process is better handled by the Congress. Although state authority over water would still be vulnerable, resolving this conflict in the Congress would have guaranteed a more thorough examination of the complex and competing issues inherent in the debate over state regulation of water in interstate commerce. Perhaps more significantly, judicial deference to congressional authority would have left traditional commerce clause analysis less vulnerable to attack by those who would question its applicability to complex questions of national economic and resource policy, and state sovereignty.

---

[361] *See supra* text and notes at notes 356-58.